Supreme Court, U.S.
FILED
931875 MAY 24 1994
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1993

R.H. RISON, ET AL., PETITIONERS

v.

JOHN DEMJANJUK, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DREW S. DAYS, III
Solicitor General
JO ANN HARRIS
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
RONALD J. MANN
Assistant to the Solicitor General
J. DOUGLAS WILSON
PATTY MERKAMP STEMLER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

30 pp

QUESTION PRESENTED

Whether attorneys for the government who acted in good faith and without a subjective intent to defraud nevertheless committed fraud upon the court by failing to disclose during respondent's denaturalization and extradition proceedings information that they did not consider exculpatory.

PARTIES TO THE PROCEEDINGS

R.H. Rison is presently the Warden at the Federal Prison Medical Facility at Springfield, Missouri. In 1985, when respondent filed his habeas corpus petition seeking relief from extradition, Joseph Petrovsky was the warden of the facility, and the decisions below accordingly bear his name. The remaining defendants in respondent's habeas corpus action were the Attorney General, the Secretary of State, and the United States District Court for the Northern District of Ohio. Because we do not represent the United States District Court, that entity technically is a respondent in this Court. For convenience, the petition nevertheless refers to Demjanjuk as respondent in the singular.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Rule involved	2
Statement	2
Reasons for granting the petition	14
Conclusion	24

TABLE OF AUTHORITIES

Cases:

Abatti v. *C.I.R.*, 859 F.2d 115 (9th Cir. 1988) 16

Alexander v. *Robertson*, 882 F.2d 421 (9th Cir. 1989) 16

Aoude v. *Mobil Oil Corporation*, 892 F.2d 1115 (1st Cir. 1989) 15

Brady v. *Maryland*, 373 U.S. 83 (1963) 14, 20

Browning v. *Navarro*, 826 F.2d 335 (5th Cir. 1987) 15

Chambers v. *NASCO, Inc.*, 501 U.S. 32 (1991) ... 19

Demjanjuk v. *Israel*, Crim. App. No. 347/88 (Isr. Sup. Ct. July 29, 1993) 5, 11, 12, 23

Demjanjuk, In re, No. A8 237 417 (Executive Office for Immigration Review May 23, 1984), appeal dismissed, No. A8 237 417 (BIA Feb. 14, 1985), aff'd, *United States* v. *Demjanjuk*, 767 F.2d 922 (6th Cir.), cert. denied, 474 U.S. 1034 (1985) 3-4

Fedorenko v. *United States*, 449 U.S. 490 (1981) .. 23

Fernandez v. *Phillips*, 268 U.S. 311 (1925) 4

Gekas v. *Pipin* (*In re Met-L-Wood Corporation*), 861 F.2d 1012 (7th Cir. 1988), cert. denied, 490 U.S. 1006 (1989) 17

Cases – Continued: Page

Great Coastal Express, Inc. v. *International Brotherhood of Teamsters*, 675 F.2d 1349 (4th Cir. 1982), cert. denied, 459 U.S. 1128 (1983) ... 15
Harte-Hanks Communications, Inc. v. *Connaughton*, 491 U.S. 657 (1989) 18
Hazel-Atlas Glass Co. v. *Hartford-Empire Company*, 322 U.S. 238 (1944) 15, 16, 19
Israel v. *Demjanjuk*, Crim. Case (Jerusalem) No. 373186 (Apr. 18, 1988) 5
Jackson v. *Virginia*, 443 U.S. 307 (1979) 11
Kupferman v. *Consolidated Research and Manufacturing Corporation*, 459 F.2d 1072 (2d Cir. 1972) 22
Lord v. *Goddard*, 54 U.S. (13 How.) 198 (1851) ... 19
Montana v. *United States*, 440 U.S. 146 (1979) 24
Pfizer, Inc. v. *International Rectifier Corp.* (*In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*), 538 F.2d 180 (8th Cir. 1976), cert. denied, 429 U.S. 1040 (1977) 15-16
Rozier v. *Ford Motor Company*, 573 F.2d 1332 (5th Cir. 1978) 15
SEC v. *ESM Group, Inc.*, 835 F.2d 270 (11th Cir.), cert. denied, 486 U.S. 1055 (1988) 17
Senate Realty Corporation v. *CIR*, 511 F.2d 929 (2d Cir. 1975) 17
Shotwell Manufacturing Co. v. *United States*, 371 U.S. 341 (1963) 22
United States v. *Demjanjuk*, 518 F. Supp. 1362 (N.D. Ohio 1981), aff'd, 680 F.2d 32 (6th Cir.), cert. denied, 459 U.S. 1036 (1982) 3, 10
United States v. *Stauffer Chemical Co.*, 464 U.S. 165 (1984) 24
United States v. *Throckmorton*, 98 U.S. (8 Otto) 61 (1878) 16
Virgin Islands Housing Authority v. *David*, 823 F.2d 764 (3d Cir. 1987) 17
Wilson v. *Johns-Manville Sales Corp.*, 873 F.2d 869 (5th Cir.), cert. denied, 493 U.S. 977 (1989) .. 15

Treaty, statute, and rules: Page

Convention on Extradition, Dec. 10, 1962, U.S.-Israel, 14 U.S.T. 1707 4

Israel's Nazi and Nazi Collaborators (Punishment) Law, 5710-1950 4

1 Model Penal Code § 2.02(2)(c) (1985) 18

Fed. R. Civ. P.:

Rule 60(b) 2, 14, 15, 17, 18, 19

Rule 60(b)(3) 18

Miscellaneous:

Black's Law Dictionary (6th ed. 1990) 19

7 James Wm. Moore et al., *Moore's Federal Practice* (2d ed. 1974) 17

1 Joseph Story, *Commentaries on Equity Jurisprudence* (Jairus W. Perry 12th ed. 1877) 19

2 Restatement (Second) of Torts (1965) 17-18

Webster's Third New International Dictionary (1986) 19

11 Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* (1973) 18-19

In the Supreme Court of the United States

OCTOBER TERM, 1993

No.

R.H. RISON, ET AL., PETITIONERS

v.

JOHN DEMJANJUK, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of R.H. Rison, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals vacating its 1985 judgment allowing respondent's extradition (App. 1a-86a) is reported at 10 F.3d 338. The report of the special master (App. 87a-305a) is not reported. A related opinion of the court of appeals allowing respondent's extradition is reported at 776 F.2d 571. Related opinions of the district court finding that respondent was subject to extradition and denying his petition for a writ of habeas corpus seeking relief from extradition are reported at 612 F. Supp. 544 and 571, respectively.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1993. A petition for rehearing was denied on February 24, 1994. App. 307a-308a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULE INVOLVED

Rule 60(b), Fed. R. Civ. P., provides in part as follows:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: * * * (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party * * *. The motion shall be made within a reasonable time, and for reaso[n] * * * (3) not more than one year after the judgment, order, or proceeding was entered or taken. * * * This rule does not limit the power of a court * * * to set aside a judgment for fraud upon the court.

STATEMENT

1. Respondent was born in 1920 in what was then the Ukrainian Republic of the Soviet Union. In 1940, he was conscripted into the Soviet Army; sometime in the next few years, he was captured by the Germans. By July of 1942, respondent, like other Soviet soldiers captured by the Germans, had been transferred to an SS training camp in Trawniki, Poland. That camp was established to carry out "Aktion Reinhard," the Nazi plan for the extermination of the Jews from countries under Nazi control. The Trawniki camp trained the Soviet prisoners of war to

serve as guards at death camps set up at Belzec, Sobibor, and Treblinka and to round up and transport Jews from the ghettoes to which they had been confined. In 1952, respondent was admitted to the United States as a lawful permanent resident after executing documents stating that he had worked as a farmer in Sobibor from 1934 until 1943; the documents that respondent executed omitted any reference to his service in the SS. See *United States* v. *Demjanjuk*, 518 F. Supp. 1362, 1363-1365 (N.D. Ohio 1981), aff'd, 680 F.2d 32 (6th Cir.), cert. denied, 459 U.S. 1036 (1982); Gov't C.A. App. 323-332 (reproducing documents executed by respondent in connection with his entry to this country).

In the 1980s, a federal district court denaturalized respondent and the Attorney General ordered his deportation based on respondent's service during World War II as an SS guard at the camps in Treblinka and Trawniki and the misrepresentations he made to immigration officials when he entered the United States. At the denaturalization trial, the government introduced into evidence an original German war document bearing respondent's picture and indicating his service at Trawniki. After considering respondent's objections, as well as expert testimony, the court concluded that the document was an authentic identification card issued to respondent at Trawniki.[1] *United States* v. *Demjanjuk*, 518 F. Supp. at 1365-1369 (denaturalization); *In re Demjanjuk*, No. A8 237 417 (Executive Office for Immigration Review May 23, 1984)

---

[1] Relying principally on a notation on the Trawniki identification card indicating that respondent had been posted to the Sobibor death camp in March of 1943, the denaturalization complaint also alleged that respondent had served as an SS guard at that camp. The district court had no occasion to consider that allegation because it found other adequate grounds for denaturalization, as explained in the text. 518 F. Supp. at 1376 n.31.

(*reproduced in* Gov't C.A. App. 344-358), appeal dismissed, No. A8 237 417 (BIA Feb. 14, 1985) (*reproduced in* Gov't C.A. App. 359-374), aff'd, *United States* v. *Demjanjuk*, 767 F.2d 922 (6th Cir.) (Table), cert. denied, 474 U.S. 1034 (1985).

2. In November 1983, the State of Israel requested that the United States extradite respondent for trial on charges that he committed war crimes involving the murder of civilians at the Treblinka death camp, in violation of Israel's Nazi and Nazi Collaborators (Punishment) Law, 5710-1950. See Gov't C.A. App. 389-404 (reproducing Israel's request for extradition). Israel supported its request with the affidavits and testimony of six Treblinka survivors who identified respondent's photograph as depicting a Ukrainian guard named "Ivan" who operated the gas chambers. Pursuant to its obligation under the Convention on Extradition, Dec. 10, 1962, U.S.-Israel, 14 U.S.T. 1707, the government filed a complaint in the Northern District of Ohio seeking a warrant authorizing respondent's extradition to Israel. On April 15, 1985, the district court held that respondent was subject to extradition because the survivor affidavits established probable cause to believe that respondent had murdered civilians at Treblinka in 1942 and 1943. 612 F. Supp. 544.

The district court thereafter denied respondent's petition for a writ of habeas corpus, which sought relief from extradition. 612 F. Supp. 571 (1985). The court of appeals affirmed. 776 F.2d 571 (1985). Noting that "[t]he scope of review in habeas corpus following an extradition order is quite narrow," the court quoted the general principles articulated by Justice Holmes in *Fernandez* v. *Phillips*, 268 U.S. 311, 312 (1925), which confine review of the extradition order to the question "whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty." 776 F.2d at 576. After

reviewing the "sworn testimony by affidavits from six witnesses who were at Treblinka in 1942 and 1943 who identified [respondent]," the court concluded: "Surely the evidence in this case satisfied this lenient standard." *Ibid.* This Court denied certiorari, 475 U.S. 1016 (1986), and respondent thereafter was extradited to Israel.

In April 1988, a three-judge panel in Israel convicted respondent of war crimes after finding beyond a reasonable doubt that respondent was the Treblinka gas chamber operator known as "Ivan the Terrible." *Israel* v. *Demjanjuk,* Crim. Case (Jerusalem) No. 373/86 (Apr. 18, 1988).[2] While respondent's appeal to the Supreme Court of Israel was pending, Israeli prosecutors obtained from the former Soviet Union interrogation records of individuals who identified a photograph of an individual named Ivan Marchenko as the photograph of a gas chamber operator at Treblinka; one guard stated that Ivan Marchenko had been known to the Jewish prisoners as "Ivan the Terrible." *Demjanjuk* v. *Israel,* Crim. App. No. 347/88 (Sup. Ct. July 29, 1993), slip op. 388, ¶ 453 (see Gov't C.A. Reh. App. C11).[3]

3. In 1992, based on press reports that the Department of Justice had possessed information relating to Mar-

---

[2] At pages 431-645 of its appendix in the court of appeals, the government reproduced an English translation of the verdict in that case, which was published in 1991 as *The Demjanjuk Trial* by the Israel Bar Publishing House in Tel Aviv.

[3] Because we have not yet received a complete official English translation of the opinion of the Supreme Court of Israel in the *Demjanjuk* case, this petition cites directly to the paperbound version of the original opinion, which was issued by the court in Hebrew. Appendix C to the government's petition for rehearing in the court of appeals provides an English translation of portions of the opinion. This certiorari petition provides cross-references to that translation for the convenience of the Court.

chenko that was not disclosed to respondent at the time of the extradition, the court of appeals reopened its extradition judgment and appointed a special master, United States District Judge Thomas A. Wiseman, Jr., to determine whether government attorneys committed fraud upon the court in the proceedings against respondent. App. 43a-45a, 46a-49a, 306a.

4. Over a period of about six months, the special master heard the live testimony of six attorneys, accepted the deposition testimony of several other witnesses, and reviewed over 300 exhibits. App. 93a-94a. On June 30, 1993, the special master issued a 210-page report in which he concluded that the case should not be reopened. *Id.* at 87a-305a.

a. The special master rejected each of respondent's allegations of fraud. App. 250a-258a. The special master's findings with respect to three specific allegations made by respondent are important to this petition: those regarding the so-called Fedorenko protocols, a Polish Main Commission list of Treblinka guards, and the identification testimony of Otto Horn.

i. The special master explained that in 1978 the United States government received materials from the Soviet Union in response to a request for information regarding Treblinka guard Feodor Fedorenko. Those materials—generally referred to as the Fedorenko protocols—included an excerpt of a 1945 record of interrogation of a Treblinka guard named Pavel Leleko (who had been executed in 1945) and a 1978 statement of another guard named Nikolai Malagon. App. 119a-123a (special master's factual discussion of acquisition of Fedorenko protocols). Leleko stated that the gas chambers were operated by

"Marchenko and Nikolay," whom Leleko described as "motorists." *Id.* at 58a-59a (appendix to opinion of court of appeals reproducing text of statement). Malagon stated that a guard named "Marchenko,Nikolay [*sic*]" worked near the "diesel engines by the gas chambers." Gov't C.A. App. 149 (text of statement).[4]

After reviewing those statements, the special master concluded that the government's conduct regarding them was not improper. The special master noted that neither statement mentioned "Ivan the Terrible" or any guard named Ivan, and also pointed out that the statements did not "refer to Ivan's notorious acts [and] provided nothing to connect the two names [Marchenko and Nikolay] with either Ivan the Terrible or Ivan Demjanjuk." App. 259a. Most important, based on the testimony and contemporaneous notes of the two government attorneys who had read the Fedorenko protocols, the special master concluded that those attorneys had not considered the statements to be exculpatory. *Id.* at 123a, 126a-127a, 159a-167a. Instead, following receipt of a second statement by Malagon, in which Malagon indicated that there were two gas chamber "engine operator[s]" at Treblinka named Nikolay Marchenko and "Ivan Demedyuk or Ivan Dem'yanyuk" (Gov't C.A. App. 214-216, 850 (text of subsequent

---

[4] The comma between the names "Marchenko" and "Nikolay" appears to have been introduced by the translator, because it does not appear in the original Russian. Although the statement is reproduced as an appendix to the opinion of the court of appeals (App. 60a-64a), this petition cites to the photocopy included in our court of appeals appendix because the printed version attached to the opinion of the court of appeals has different spacing than the original English translation available to the government attorneys.

Malagon statement)[5]), the attorneys concluded that Marchenko's first name was Nikolay. App. 165a-167a.

ii. The special master also discussed another document that apparently refers to Marchenko, a 1975 article about Treblinka published by the Polish Main Commission for the Investigation of Hitlerite Crimes. App. 128a-132a. That article listed 43 "known" Treblinka guards, including one "Marczenko Iwan"; the article provided no additional information about that guard. See Gov't C.A. App. 282-283 (relevant portion of article). The special master found that the government had provided respondent with an English translation of that article in August 1982, more than three years before respondent's extradition to Israel. App. 129a-130a, 199a-200a.

iii. The special master also rejected respondent's contention that the government committed fraud in presenting the testimony of former SS guard Otto Horn at the denaturalization trial. App. 140a-154a, 250a-251a. In a

---

[5] The court of appeals reprinted both the first and second statements as appendices to its opinion, App. 60a-67a. This petition cites for clarity to the government's appendix in the court of appeals, which contained both those items (Gov't C.A. App. 144-156, 214-216), and a later partial version (Gov't C.A. App. 850) correcting the translation of the second statement.

The second statement was produced when Soviet officials reinterviewed Malagon in October of 1979. In that interview, Malagon stated that he had known a Treblinka guard named "Ivan Demedyuk or Ivan Dem'yanyuk" who began as a cook and later was transferred to a position as an engine operator at the gas chambers. Gov't C.A. App. 214-216, 850. Although Malagon indicated in that statement that he would be able to identify a photograph of the man named "Ivan Demedyuk," he was unable to identify respondent's photograph. The government disclosed Malagon's name and address to respondent before the denaturalization trial in response to an interrogatory requesting the names of persons who had failed to identify respondent's photograph. App. 253a, 301a.

November 1979 interview in his Berlin apartment, Horn told government attorney Norman Moscowitz that a Ukrainian named "Ivan" had operated the gas chambers at Treblinka. To avoid becoming a witness to a possible identification, Moscowitz turned his back while investigators presented two spreads containing respondent's photographs. After the interview, the investigators told Moscowitz that Horn had made a "good, valid identification" of respondent; the investigators thereafter confirmed the positive identification in reports to their supervisor. *Id.* at 140a-143a.

Horn repeated the identification in February 1980 in a deposition, but Horn described the photospread procedure somewhat differently than the investigators described it in their reports. App. 144a-146a. Moscowitz did not disclose any problem with the identification proceeding to respondent before the denaturalization trial; he explained to the special master that he was not aware of the discrepancy because he did not read the reports until long after the denaturalization trial. *Id.* at 147a. The special master accepted that explanation, noting that it was supported by "the unanimous testimony in these proceedings," and that "there is no substantial evidence in the record to gainsay the crux of Mr. Moscowitz's testimony." *Id.* at 147a, 148a; see *id.* at 251a ("I find that Norman Moscowitz in fact did not know that Otto Horn's identification of [respondent's] photographs proceeded in the manner described in the [investigators'] reports."). The special master suggested that Moscowitz may have "felt that his conversations [on the day of the identification] with [the investigators] provided him with ample information on the way in which the [photo identification] was conducted." *Id.* at 149a. Accordingly, the special master concluded that respondent's contention that Moscowitz

committed fraud when he did not disclose the circumstances of the identification was "without merit." *Id.* at 251a.

b. In addition to rejecting each of respondent's particularized allegations of fraud, the special master evaluated the conduct of the government attorneys who had participated in the extradition proceedings. The special master stated that they had "cooperated fully in this investigation," that "they testified truthfully, and that they are now, and were then, principled, albeit fallible." App. 263a. Similarly, he found that the attorneys possessed "good-faith beliefs, based on credible evidence [at the relevant times], * * * that [respondent] had served at both Treblinka and [the] Sobibor [death camps]," *id.* at 189a-190a; that they "had a good faith belief that they had met their discovery obligations," *id.* at 258a; and that they "did not believe that they possessed and withheld exculpatory information," *id.* at 243a.[6] The special master concluded (*id.* at 263a):

> [The government attorneys] acted in good faith. They did not intend to violate the Rules or their ethical obligations. They were not reckless; they did not misstate facts or the law as they understood them, and did not make statements in ignorance while aware of their ignorance. Although they were blinded to what

---

[6] In the portion of his report describing the government's response to respondent's discovery requests, the special master stated that the government attorneys at one point were "playing hardball" by narrowly construing one of respondent's interrogatories. App. 234a. The special master expressly found, however, that the "attorneys acted in good faith in [interpreting the interrogatory]." *Ibid.*; see 518 F. Supp. at 1385 n.52 (denaturalization court did "not ascribe any sinister motivation" to government's construction of fourth set of interrogatories).

> we may now perceive to be the truth, they were not wilfully blind.

Because the special master found no fraud and no other basis for reopening the extradition proceedings, he concluded his report by recommending that "the case of *Demjanjuk v. Petrovsky, et al.* be closed." *Id.* at 266a.

5. In July 1993, the Supreme Court of Israel issued its decision reviewing respondent's conviction as a Nazi collaborator. The court applied a strict standard under which it could uphold the conviction only if the only rational conclusion the record would support was that respondent was the gas chamber operator known as Ivan the Terrible of Treblinka. *Demjanjuk* v. *Israel,* slip op. 391, ¶ 456 (see Gov't C.A. Reh. App. C16).[7] After reviewing evidence that an individual named Ivan Marchenko might have been a gas chamber operator at Treblinka, the court concluded that there was a reasonable doubt that respondent was the individual who had been known as Ivan the Terrible, and accordingly overturned his conviction. Slip. op. 392, ¶¶ 456-457 (see Gov't C.A. Reh. App. C18-C20).

The Supreme Court of Israel stressed that, in its view, none of the new evidence derogated from the evidence that proved that respondent had served as an SS guard at Trawniki, service that the court characterized as an integral part of the German extermination machine. *Demjanjuk* v. *Israel,* slip op. 393, ¶¶ 458-459 (see Gov't C.A. Reh. App. C20-C21). The court also found that other new

---

[7] That standard is much stricter than the standard for reviewing the adequacy of the record to support factual conclusions in this country. See *Jackson* v. *Virginia,* 443 U.S. 307, 319 (1979) (critical question is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt").

evidence, not available at the time of respondent's extradition or trial, confirmed respondent's service in the SS and completely vitiated his claim that his Trawniki identification card was a forgery. Slip. op. 383, ¶ 447 (see Gov't C.A. Reh. App. C1-C2). Furthermore, the court concluded that respondent's extradition had been lawful, because the survivor identifications on which the extradition was based had provided an adequate basis for the extradition decision.[8] Slip. op. 404 (see Gov't C.A. Reh. App. C40).

6. In November 1993, the court of appeals vacated its 1985 judgment and the judgment of the district court allowing respondent's extradition. App. 1a-86a.[9] The court started by summarizing the background of the case and the special master's report, including the special master's findings that the attorneys for the government "acted in good faith, * * * did not intend to violate the Rules or their ethical obligations[,] * * * did not misstate facts or the law as they understood them, and did not make statements in ignorance while aware of their ignorance." *Id.* at 25a (quoting *id.* at 263a). The court concluded that it "cannot find [those findings] clearly erroneous." *Id.* at 25a.

The court did, however, overturn the special master's conclusion that the attorneys were not reckless. App.

---

[8] The Supreme Court of Israel also affirmed the trial court's finding that the testimonies of the identification witnesses, including Otto Horn, were reliable. See *Demjanjuk* v. *Israel*, slip op. 386-388, ¶¶ 450-452 (see Gov't C.A. Reh. App. C6-C10). The specific discussion of the Horn identification appears at slip op. 387 (¶ 451(beth)).

[9] On August 6, 1993, after the Supreme Court of Israel announced its decision, the court of appeals issued an order granting interim relief that prohibited the United States government from preventing respondent's return to the United States. See Order, No. 85-3435 (6th Cir. Aug. 6, 1993).

25a-31a. It reasoned that recklessness "should be determined from an objective examination of the actions of the parties in a particular set of circumstances." *Id.* at 26a. The court concluded that, evaluated against that objective standard, the government attorneys acted recklessly on three occasions: (1) in failing to produce the Fedorenko protocols; (2) in delaying production of the Polish Main Commission list of Treblinka guards[10]; and (3) in failing to read and produce investigative reports describing the identification procedures followed with Otto Horn. *Id.* at 27a-31a.

The court of appeals then considered whether a judgment should be reopened for fraud upon the court based solely on an objective finding of recklessness, without a subjective intent to commit fraud. App. 32a-33a. The court acknowledged that "there are cases holding that a 'plan or scheme' must exist in order to find fraud on the court," but nevertheless concluded that "subjective intent to commit fraud * * * is not required in a case such as this. Reckless disregard for the truth is sufficient." *Id.* at 33a.[11]

---

[10] The opinion of the court of appeals states (App. 28a) that the list was not furnished until 1992. That statement is incorrect; the list was furnished to respondent in 1982, as respondent expressly acknowledged on page 5 of the chart appended to respondent's "First Brief for Petitioner," filed in the court of appeals on July 27, 1992. The court of appeals may have been aware of the correct date, see App. 30a (statement of court of appeals that list should "have been furnished in 1979, * * * not three years later"), but it declined to correct the erroneous reference to 1992 even after the government specifically called the error to the panel's attention in its petition for rehearing, see Gov't C.A. Pet. for Reh. 15 & n.9. The court also declined to correct its erroneous statement (App. 11a) that the list included "more than 70" names. As review of the list demonstrates, there were only 43 names on the list. See Gov't C.A. App. 282 (reproducing list); Gov't C.A. Pet. for Reh. 14 (noting panel's error).

[11] The court of appeals stated (App. 33a-36a) that its holding that subjective bad faith is not required for a finding of fraud upon the court

Accordingly, because it had concluded that the attorneys had acted recklessly, the court entered an order vacating the judgment in the extradition proceedings "on the ground that the judgments were wrongly procured as a result of prosecutorial misconduct that constituted fraud on the court." *Id.* at 42a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that a court may exercise its power to overturn a judgment for "fraud upon the court," as described in the last clause of Fed. R. Civ. P. 60(b), even when a party acted in "good faith." Applying its holding that "subjective intent to commit frau[d] is not required," App. 33a, the court of appeals overturned a final judgment based on its dissatisfaction with good-faith actions taken by attorneys who represented the government in the litigation that led to the prior judgment. Both the court's understanding of its power to set aside a final judgment and its decision in this case are inconsistent with the decisions of other courts of appeals and the language of Rule 60(b). As every other court to interpret that Rule has held, the power to set aside civil judgments that are not challenged within a year is confined to instances in which a party has engaged in egregious and deliberate misconduct, such as bribery of a judge or fabrication of evidence. The decision below warrants review because of the circuit conflict it creates, the destabilizing effect of its holding on the reliability of civil judgments, and the impact of the decision on the extensive litigation involving respondent.

---

was supported by this Court's decision in *Brady* v. *Maryland*, 373 U.S. 83 (1963). The court concluded that *Brady* applies in denaturalization and extradition cases in which the government relies on proof of criminal conduct (App. 34a), and pointed out that *Brady* applies "irrespective of the good faith or bad faith of the prosecution." *Ibid.* (quoting *Brady*, 373 U.S. at 86).

1. The court of appeals' observation that "there are cases holding that a 'plan or scheme' must exist in order to find fraud on the court" (App. 33a) considerably understates the distance between the court's approach and the decisions of other courts exercising the "fraud upon the court" power. In fact, the standard adopted by the court of appeals in this case is inconsistent with standards articulated by the overwhelming majority of the courts of appeals. Recognizing the "deep-rooted policy in favor of the repose of judgments" (*Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 244 (1944)), the First, Fourth, Fifth, Eighth, and Ninth Circuits have held that the power described in Rule 60(b) to set aside a judgment for "fraud upon the court" cannot be exercised without proof of a "plan" or "scheme" to defraud.[12] That formu-

---

[12] *E.g.*, *Aoude* v. *Mobil Oil Corporation*, 892 F.2d 1115, 1118 (1st Cir. 1989) ("A 'fraud on the court' occurs where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense."); *Great Coastal Express, Inc.* v. *International Brotherhood of Teamsters*, 675 F.2d 1349, 1356 (4th Cir. 1982) (requiring "deliberate scheme to directly subvert the judicial process"), cert. denied, 459 U.S. 1128 (1983); *Wilson* v. *Johns-Manville Sales Corp.*, 873 F.2d 869, 872 (5th Cir.) (fraud upon the court "requires a showing of an unconscionable plan or scheme which is designed to improperly influence the court in its decision") (internal quotation marks omitted), cert. denied, 493 U.S. 977 (1989); *Browning* v. *Navarro*, 826 F.2d 335, 344 (5th Cir. 1987) (fraud upon the court doctrine provides that claimant "must demonstrate * * * a scheme or collusion that is designed to influence corruptly the proceedings, or to inhibit the ability of an adverse party to fully present his case or defense"); *Rozier* v. *Ford Motor Company*, 573 F.2d 1332, 1338 (5th Cir. 1978) ("[I]t is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision."); *Pfizer, Inc.* v. *International Rectifier Corp.* (*In re Coordi-*

lation, which the court of appeals expressly rejected, unmistakably requires intentional misconduct. Under that standard, the special master's findings that the government attorneys had a good-faith belief that they had met their discovery obligations and that they did not intentionally violate any rules or ethical obligations—findings that the court of appeals expressly declined to overturn (App. 25a)—would mandate rejection of respondent's efforts to have the extradition judgment set aside. Compare *United States* v. *Throckmorton*, 98 U.S. (8 Otto) 61, 69 (1878) (failure to come forward with information is not fraud upon the court in the absence of a "corrupt motive").

Similarly, the Second, Third, and Eleventh Circuits have adopted the following formulation suggested by Professor Moore:

> "Fraud upon the court" should, we believe, embrace only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases.

---

nated Pretrial Proceedings in Antibiotic Antitrust Actions), 538 F.2d 180, 195 (8th Cir. 1976) (fraud upon the court is "a scheme to interfere with the judicial machinery"), cert. denied, 429 U.S. 1040 (1977); *Alexander* v. *Robertson*, 882 F.2d 421, 425 (9th Cir. 1989) (rejecting a claim of fraud where there was no evidence that the misconduct was "designed to improperly influence the court in its decision"); *Abatti* v. *C.I.R.*, 859 F.2d 115, 118 (9th Cir. 1988) ("Fraud on the court must involve an unconscionable plan or scheme which is designed to improperly influence the court in its decision.") (internal quotation marks omitted); see also *Hazel-Atlas Glass Co.*, 322 U.S. at 245 (fraud upon the court doctrine satisfied by proof of "a deliberately planned and carefully executed scheme to defraud" the court).

Senate Realty Corporation v. *CIR*, 511 F.2d 929, 931 (2d Cir. 1975) (quoting 7 James Wm. Moore et al., *Moore's Federal Practice* ¶ 60.33, at 515 (2d ed. 1974)); *Virgin Islands Housing Authority* v. *David*, 823 F.2d 764, 767 (3d Cir. 1987) (same)[13]; *SEC* v. *ESM Group, Inc.*, 835 F.2d 270, 273 (11th Cir.) (same), cert. denied, 486 U.S. 1055 (1988); see also *Gekas* v. *Pipin* (*In re Met-L-Wood Corporation*), 861 F.2d 1012, 1018 (7th Cir. 1988) ("[T]he fraud must involve corruption of the judicial process itself."), cert. denied, 490 U.S. 1006 (1989). As noted by the Second Circuit, the common element in cases in which a final judgment has been set aside for fraud upon the court is "evil intent, deceit, or collusion, [a] narrow definition [that] reflects the policy of putting an end to litigation." *Senate Realty Corporation*, 511 F.2d at 933.

2. Nor can the standard articulated by the court of appeals be reconciled with the structure and language of Rule 60(b). Even if the court of appeals were correct in rejecting the special master's conclusion that the government attorneys were not reckless,[14] the findings in this case cannot

---

[13] To be sure, the Third Circuit suggested in *David* that something less than deliberate conduct could constitute fraud upon the court. See 823 F.2d at 767 (stating that a misrepresentation made with a "callous disregard" of the record can support a finding of fraud upon the court). But whatever the boundaries of that standard, it would not justify invalidation of the judgment in this case, in which the court of appeals expressly declined to disturb the special master's finding that the government attorneys "did not misstate facts or the law as they understood them, and did not make statements in ignorance while aware of their ignorance." App. 25a (quoting *id.* at 263a).

[14] The court of appeals concluded that the government attorneys showed a reckless disregard for their obligations to disclose information to respondent under a standard that includes a situation in which an individual "does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so." App. 26a. The court relied on a provision of the Restatement (Second) of

properly be construed to constitute "fraud upon the court" as described in Rule 60(b).

First, the structure of the Rule indicates that only the most egregious misconduct should be sufficient to invalidate a civil judgment that is not challenged within one year. Rule 60(b)(3) permits a judgment to be overturned for "fraud * * *, misrepresentation, or other misconduct of an adverse party," but only if "[t]he motion [is] made within a reasonable time, and * * * not more than one year after the judgment * * * was entered." Because the penultimate sentence of Rule 60(b) permits a judgment to be invalidated at any time for "fraud upon the court," the natural inference is that "fraud upon the court" is limited to a particularly egregious subset of the "fraud" described in Rule 60(b)(3); a broad interpretation extending the "fraud upon the court" provision to all cases of fraud would remove any force from the one-year time limitation on motions for relief under Rule 60(b)(3). See 11 Charles Alan Wright and Arthur R. Miller, *Federal Practice and*

Torts that articulates a standard for establishing reckless disregard of another individual's physical safety. See 2 Restatement (Second) of Torts § 500, at 587 (1965). That standard is substantially different from this Court's definition of "reckless disregard for the truth"—the equivalent of "actual malice" in a defamation action—as requiring a "high degree of awareness of * * * probable falsity" or "serious doubts as to the truth of [the statement]," *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657, 667 (1989) (internal quotation marks omitted); see also 1 *Model Penal Code* § 2.02(2)(c), at 226 (1985) ("A person acts recklessly * * * when he consciously disregards a substantial and unjustifiable risk * * *. The risk must be of such a nature and degree that * * * its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe."). Thus, even if recklessness can suffice to show fraud upon the court, the court of appeals erred in extending recklessness in this context to include conduct that a court considers to be, at worst, objectively unreasonable.

Procedure § 2870, at 253-254 (1973); cf. *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 44 (1991) (inherent power "to set aside fraudulently begotten judgments, * * * [b]ecause of [its] very potency, * * * must be exercised with restraint and discretion"); *Hazel-Atlas Glass Co.*, 322 U.S. at 244 ("courts of equity have been cautious in exercising their [inherent] power over * * * judgments").

Moreover, by concluding that it can overturn judgments solely because of errors counsel made in good faith, the court of appeals went further than extending "fraud upon the court" to the entire universe of cases involving "fraud" within the meaning of Rule 60(b). The definition articulated by the court of appeals extends the court's power to cases that cannot plausibly be included within any customary definition of fraud. As *Black's Law Dictionary* puts it, fraud is "synonymous" with "bad faith." *Black's Law Dictionary* 660 (6th ed. 1990). It is "an act of trickery or deceit esp. when involving misrepresentation." *Webster's Third New International Dictionary* 904 (1986). Similarly, Justice Joseph Story concluded that the "true definition" of fraud is "any cunning, deception, or artifice used to circumvent, cheat, or deceive another." 1 Joseph Story, *Commentaries on Equity Jurisprudence* § 186, at 185 (Jairus W. Perry 12th ed. 1877) (quoting a Roman jurist). Similarly, this Court has characterized it as "mean[ing] an intention to deceive." *Lord* v. *Goddard*, 54 U.S. (13 How.) 198, 211 (1851). The Court went on to explain in that case that a "party [who] honestly stated his own opinion, believing at the time that he stated the truth," could not be held liable for fraud, "although the representation turned out to be entirely untrue." *Ibid.*

None of those definitions properly can be applied to this case, given the undisturbed findings that the government attorneys acted in "good faith" and did not intentionally withhold information that they believed they were obli-

gated to disclose.[15] The worst that can be said of the conduct of the attorneys is that they failed to recognize the significance of the Fedorenko protocols.[16] The court of

[15] Contrary to the suggestion of the Sixth Circuit (App. 33a-36a), nothing in *Brady* v. *Maryland*, 373 U.S. 83 (1963), requires a contrary result in this case. *Brady* establishes only that the government violates a criminal defendant's right to due process when it fails to disclose evidence that is both material to guilt or punishment and favorable to the accused. 373 U.S. at 87. Although an unintentional *Brady* violation may provide a basis for attacking a criminal conviction, the prosecutor who unwittingly violates the *Brady* rule has not committed fraud upon the court. Moreover, for the reasons discussed below, we do not believe it plausibly can be said that the government withheld evidence that was material to the decision to extradite respondent.

[16] The court of appeals' reliance on the Polish Main Commission list and on the materials related to the Horn identification is entirely misplaced. First, because the government provided respondent with a copy of the Polish list in August 1982, more than three years before respondent's extradition (see note 10, *supra* (discussing panel's confusion about date list was produced)), the timing of that production cannot plausibly provide a basis for vacating the extradition judgment. In any event, it is difficult to see how the omission of respondent's name from an admittedly incomplete list of Treblinka guards (the list contained 43 of the "approximately 100" Trawniki guards at Treblinka (App. 29a)) could have affected the conclusion that the eyewitness identifications submitted by Israel established probable cause to extradite petitioner. Respondent did not make such an argument during the three-year period between his receipt of the list and his extradition.

The irrelevance of the materials related to Horn's identification is, if anything, even more clear: Because Israel did not submit SS officer Horn's identification of respondent in support of its extradition request, the government's failure to produce reports that could cast doubt on the validity of that identification could not possibly have misled the court of appeals into allowing respondent's extradition. Moreover, respondent's criticisms of that identification are not persuasive. After carefully reviewing the identification procedure, including the investigators' reports on which respondent relies, the three-judge Israeli trial court concluded that "it is difficult to find fault with this identification procedure." Gov't C.A. App. 564; see *id.* at 563-564 (discussing procedure); see also note 8, *supra* (discussing approval of identification by Supreme Court of Israel).

appeals upheld the master's finding that the two attorneys who read the protocols did not in fact consider them exculpatory or responsive to respondent's discovery requests in the denaturalization case.[17] Moreover, although the court of appeals stated without explanation that those protocols "name a man other than [respondent] as the notoriously cruel 'Ivan the Terrible' who ran the motors of the gas chambers," App. 9a, their relevance to the identity of the man known as Ivan the Terrible is quite ambiguous. As the special master commented after his detailed review of the extensive record, the Fedorenko protocols did not "refer to Ivan's notorious acts [and] provided nothing to connect the two names [Marchenko and Nikolay] with * * * Ivan the Terrible." *Id.* at 259a. Although the court

---

[17] Even George Parker, the attorney most skeptical of the government's proof that respondent operated the Treblinka gas chambers, did not see anything in the protocols that undermined that conclusion. As the special master explained, "[t]he most striking aspect of [Parker's] memorandum [detailing his doubts] is its complete silence regarding the references [in the Fedorenko protocols] to a man named Marchenko at the gas chambers." App. 180a; see *id.* at 162a (discussing evidence that Parker "did not believe that * * * the [Fedorenko] protocols exculpated [respondent]"), 21a (court of appeals' agreement with special master that Parker "did not make the Marchenko connection").

Similarly, Attorney Norman Moscowitz in fact thought at first that the protocols were significantly inculpatory because the Marchenko name mentioned in the protocols resembled the name respondent offered in his immigration documents as his mother's maiden name, Martschenko. Far from recklessly disregarding the protocols, Moscowitz pursued that lead until he received Malagon's second statement, in which Malagon claimed to have known both a "Nikolay Marchenko" and an "Ivan Dem'yanyuk or Ivan Demedyuk" at Treblinka. Moscowitz then concluded that Marchenko's first name was Nikolay, and that respondent was the Ivan who operated the gas chambers. See App. 163a-167a (special master's discussion of Moscowitz's investigation of the protocols).

of appeals might have been correct in concluding, based on all of the evidence that is *now* available, that the protocols provide some support for respondent's claim, it is unfair to characterize the interpretation the government's attorneys placed on those documents as reckless. And it is prodigal to characterize their actions as constituting fraud upon the court, so as to justify invalidation of the judgment in the extradition proceeding.

The ease with which the court of appeals (having the benefit of new evidence revealed after the dissolution of the Soviet Union) was willing to second-guess the judgments made by the attorneys at the time of the litigation shows the accuracy of Judge Friendly's comment that it is "all too easy to fall into the error of condemning conduct with the aid afforded by the bright glare of hindsight," *Kupferman* v. *Consolidated Research and Manufacturing Corporation,* 459 F.2d 1072, 1080 (2d Cir. 1972). Although we do not in the least "minimiz[e] the unqualified duty of scrupulous candor that rests upon government counsel in all dealings with th[e c]ourt, to characterize [the conduct in this case] as amounting to fraud upon the [c]ourt is, to say the least, utterly extravagant," *Shotwell Manufacturing Co.* v. *United States,* 371 U.S. 341, 358 (1963).

3. The circuit conflict created by the decision below warrants resolution by this Court. By diluting the standards for fraud upon the court, the court of appeals' decision undermines the traditional finality of civil judgments. As the frequent rejection of "fraud upon the court" claims by the courts of appeals demonstrates, a court's power to invalidate a judgment at any time is extremely attractive to litigants, and any broadening of that power can be expected to lead to a significant increase in litigation seeking to invalidate the final judgments of federal courts. Because the decision of the court of appeals introduces a geographic differential into the prospect of success in such litigation,

review by this Court is warranted to ensure that the civil judgments of federal courts have the same strength and finality throughout the country.

Nor does respondent's acquittal in Israel, following the extradition, deprive the decision below of continuing importance with respect to respondent. If left undisturbed, there is a significant likelihood that the decision below will hinder the government's efforts to remove respondent from the United States. Respondent's service as an SS guard at Trawniki—which, as the Israeli Supreme Court noted, has been substantially confirmed by new evidence, *Demjanjuk* v. *Israel,* slip op. 393, ¶¶ 458-459 (see Gov't C.A. Reh. App. C20-C21)—as well as his false statements concealing that service at the time he entered, rendered him subject to denaturalization even if he was not the man known as Ivan the Terrible. See *Fedorenko* v. *United States,* 449 U.S. 490 (1981); see also App. 266a (special master's explanation that new evidence does not "cast any substantial doubt" on the conclusion that respondent's conduct required denaturalization). The decision of the court of appeals, however, has called into question the validity of the existing judgment of denaturalization, and it thus may hinder the government's efforts to obtain an expeditious and definitive resolution of respondent's status.[18] If the judgment below

---

[18] Shortly after the panel issued its opinion invalidating the extradition judgment, the government, of its own volition, filed a motion in the denaturalization case asking the district court to reaffirm the denaturalization judgment on the ground that respondent's service at Trawniki furnished an independent basis for his denaturalization. See Motion To Reopen Judgment (filed Dec. 30, 1993). Respondent, on the other hand, has argued that the Sixth Circuit's finding of fraud upon the court in the extradition proceeding ~~justifies required~~ REQUIRES vacating the denaturalization judgment and dismissal of the complaint with prejudice. See Def's Resp. to Plf's Reply in Supp. of Mot. To Reopen Judgment at 4 (filed Mar. 18, 1994).

becomes final, the government may be precluded in the proceedings involving respondent's denaturalization from challenging determinations made in the course of the decision below. Cf. *United States* v. *Stauffer Chemical Co.*, 464 U.S. 165, 170-171 (1984) (applying collateral estoppel against the government); *Montana* v. *United States*, 440 U.S. 147, 155-162 (1979) (same). Accordingly, the judgment of the court of appeals continues to involve a live and very real controversy between the parties.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

RONALD J. MANN
Assistant to the Solicitor General

J. DOUGLAS WILSON
PATTY MERKAMP STEMLER
Attorneys

MAY 1994

☆ U.S. GOVERNMENT PRINTING OFFICE: 1994—301-157/86144

Supreme Court, U.S.
FILED

93187 5 MAY 24 1994

No.

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

R.H. RISON, ET AL., PETITIONERS

v.

JOHN DEMJANJUK, ET AL.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

RONALD J. MANN
Assistant to the Solicitor General

J. DOUGLAS WILSON
PATTY MERKAMP STEMLER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

310p.

TABLE OF CONTENTS

	Page
Appendix A (Opinion of the Court of Appeals (Nov. 17, 1993))	1a
Appendix B (Report of the Special Master)	87a
Appendix C (Court of Appeals June 5, 1992 order restoring case to docket)	306a
Appendix F (Court of Appeals Feb. 24, 1993 order denying rehearing en banc)	307a

APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 85-3435

JOHN DEMJANJUK, PETITIONER-APPELLANT

v.

JOSEPH PETROVSKY, ET AL., RESPONDENTS-APPELLEES

Argued Sept. 3, 1993
Decided Nov. 17, 1993

Before: MERRITT, Chief Judge; KEITH, Circuit Judge; and LIVELY, Senior Circuit Judge.

LIVELY, Senior Circuit Judge.

The question before the court is whether attorneys in the Office of Special Investigations (OSI), a unit within the Criminal Division of the Department of Justice, engaged in prosecutorial misconduct by failing to disclose to the courts and to the petitioner exculpatory information in their possession during litigation culminating in extradition proceedings, which led to the petitioner's forced departure from the United States and trial on capital charges in the State of Israel. For the reasons stated herein we conclude that OSI did so engage in prosecutorial misconduct that seriously misled the court.

I.

A.

This matter is before the court on its own motion, pursuant to an order entered on June 5, 1992. In the June 5 order we stated that information had come to the attention of the court which required us to determine whether this court's affirmance of the district court's denial of John Demjanjuk's petition for habeas corpus relief from an extradition warrant was improvident. See *Demjanjuk v. Petrovsky,* 776 F.2d 571 (6th Cir. 1985), *cert. denied,* 475 U.S. 1016, 106 S.Ct. 1198, 89 L.Ed.2d 312 (1986).

The order directed the respondents to address certain questions related to the identification of Demjanjuk as the notorious Ukrainian guard at the Nazi extermination camp near Treblinka, Poland called by Jewish inmates "Ivan the Terrible" (Ivan Grozny). The order also set the matter for oral argument on August 11, 1992. The Department of Justice appeared for the respondent.

Following briefing and oral argument, the court entered an order on August 17, 1992, appointing a Special Master pursuant to FED.R.CIV.P. 53(c). The Special Master was directed to take testimony and prepare a report on the issue of whether failure of government attorneys to disclose exculpatory information in their possession constituted prosecutorial misconduct or fraud upon the court that misled the court into allowing Demjanjuk to be extradited. Pursuant to the government's motion, a clarifying order was entered on August 31, 1992. Copies of the June 5 and August 17 orders are annexed to this opinion as Appendix 1 and Appendix 2, respectively.

B.

The Special Master, United States District Judge Thomas A. Wiseman, Jr. of the Middle District of Ten-

nessee, conducted extensive hearings over a period of approximately six months and received other evidence by deposition. After closing proceedings following oral arguments on April 30, 1993, Judge Wiseman prepared a comprehensive report (S.M. Report), which he filed with this court on June 30, 1993.

Because the district court's extradition order had been based primarily on the record of earlier denaturalization proceedings against Demjanjuk, the master included within the scope of his inquiry actions of government attorneys in the 1981 denaturalization case and later deportation proceedings as well as in the extradition case. Chief Judge Frank Battisti conducted both the denaturalization and the extradition proceedings. The district court's opinion in the denaturalization proceedings is reported at 518 F.Supp. 1362 (N.D. Ohio 1981) *aff'd per curiam,* 680 F.2d 32 (6th Cir. 1982), *cert. denied,* 459 U.S. 1036, 103 S.Ct. 447, 74 L.Ed.2d 602 (1982). The district court's opinions in the extradition proceeding are reported at 612 F.Supp. 544 and 612 F.Supp. 571 (N.D. Ohio 1985).

Demjanjuk's claims of misconduct consisted of the government's failure to disclose information that pointed to another Ukrainian guard at Treblinka, Ivan Marchenko, as "Ivan the Terrible." Demjanjuk's denaturalization and deportation orders were based on his alleged misrepresentations concerning his wartime whereabouts and activities at the time he applied for entry into the United States as a displaced person and in his application for citizenship. These orders were based primarily, although not exclusively, on Demjanjuk's failure to disclose his alleged wartime activities as "Ivan the Terrible" at Treblinka. The extradition order was based solely upon the district court's finding that Demjanjuk was Ivan the Terrible.[1] This was the

[1] In the extradition proceedings the district court considered evidence that Demjanjuk was trained as a concentration camp guard at a facility in Trawniki, Poland. The government based its claim that

charge on which Israel sought his extradition, and on which he was ultimately tried and convicted by an Israeli trial court. As the Supreme Court of Israel stated, "the fact the appellant [Demjanjuk] was a guardsman at the Trawniki unit" and similar background evidence "was not the main matter which was set before the authorities in the United States and before the court in Israel, but it was part of the collection of factual information." (Translation of the final section of the decision of the Supreme Court of Israel in Demjanjuk's appeal at 21). The "main matter" before the courts in both countries in all the proceedings, as the Supreme Court of Israel observes, and the records of proceedings in the United States establish, was the "Ivan the Terrible" charge.

We directed the parties to file briefs setting forth their views and arguments respecting the Special Master's report and set the matter for oral argument on September 3, 1993. Following full briefing and extended oral argument the matter was submitted for decision.

II.

The master made findings of fact, largely based on credibility determinations, which absolved the government attorneys of deliberately and intentionally failing to disclose information that they considered exculpatory. Judge Wiseman also found that the various proceedings against Demjanjuk were not affected by political pressures from congressional sources and various Jewish groups in the

---

Demjanjuk had served at Trawniki, and later at the Sobibor extermination camp, on a passage from a book about the Holocaust, and an identification badge supposedly issued to guards who were trained at Trawniki. The district court concluded that a decision as to the validity of "the Trawniki card" identifying Demjanjuk was not required in order to support extradition. 612 F.Supp. at 553.

United States. S.M. Report at 27-28. We are required to accept the master's findings of fact unless clearly erroneous. FED.R.CIV.P. 53(e)(2).

A.

The master considered six specific claims by Demjanjuk that acts and omissions of OSI attorneys described therein constituted prosecutorial misconduct or fraud on the court. These claims related to statements of various witnesses and a report of a Polish investigation that had come into OSI's possession. In each case the master found that government attorneys had failed to disclose or produce documents or other materials that should have been subject to disclosure or production under outstanding discovery requets and FED.R.CIV.P. 26(e). In each instance, however, the master exonerated the government attorneys on one or more of the following findings: either that the attorneys did not believe the materials were within the scope of outstanding discovery requets; that they believed in good faith that the materials did not relate to Demjanjuk; or that a particular attorney then responsible for complying with requests was not aware of the existence of specified materials even though other attorneys who worked on the Demjanjuk cases did know of and had seen the materials.

In making these determinations, the master considered each of the six claims in light of the successive sets of interrogatories filed by Demjanjuk during the denaturalization proceedings. At the time he filed the first set of interrogatories Demjanjuk filed a request for production of documents and stated that both were to be treated as of a continuing nature. Question 2 of the first set of interrogatories asked whether a statement had been obtained from any person whose name and address had been sought in Question 1. The respondents argued that they had com-

plied fully by providing names of persons who claimed to have any knowledge of Demjanjuk's alleged activities at Treblinka as requested in Question 1 of the first set. The master refused to accept the OSI attorneys' arguments, stating:

> Thus, the defendant specifically asked for the names of all witnesses to the defendant's alleged actions, and whether statements had been obtained from those people. When read in conjunction with Mr. Demjanjuk's first request for production, he clearly had requested all witness statements.

S.M. Report at 165. Similarly, the master found that the government never supplied the names of several witnesses whose identity was required to be disclosed by Question 1.

Another set of interrogatories asked specifically about foreign government reports concerning activities of Ivan the Terrible at Treblinka. The previously described materials from the Polish investigation of the Treblinka atrocities were in the government's possession in 1979, but were not produced until 1982, after the conclusion of the denaturalization proceedings. This failure was an "oversight," according to one government attorney. S.M. Report at 171. Finally, and most significantly, as early as 1978 or 1979 the government had information from official sources within the Soviet Union indicating that there were two Ukrainian operators of the gas chambers at Treblinka—Ivan and Nikolai—and that "Ivan Grozny" was a man named Ivan Marchenko, not Ivan Demjanjuk.

B.

The master found some of the respondents' failures "excusable," some "inadvertent," and most to have resulted from the government attorneys' mistaken understanding of the scope of their duty of production under the dis-

covery requests made by Demjanjuk. Judge Wiseman stated:

> [A] careful reading of Mr. Demjanjuk's discovery requests demonstrates that he asked for virtually every piece of evidence that is at issue in these proceedings. As demonstrated, the government did not provide the evidence because it believed that it was under no duty to do so. The heart of the discovery problems, therefore, was a tragic misunderstanding.

S.M. Report at 204. Noting that no fewer than eight government attorneys worked on the Demjanjuk denaturalization case, the master blamed the misunderstanding with respect to the duty to disclose and produce materials on "the unstable and fractious character" of the prosecution team. The difficulties resulting from rivalries between OSI and the United States Attorney's office in Cleveland, and the frequent changes of attorneys assigned to the case were compounded, the master found, by the attitude of the government trial attorneys that "at times bordered on gamesmanship." S.M. Report at 205.

The master found that, in interpreting Demjanjuk's requests and interrogatories so narrowly, the government attorneys were "playing hardball." S.M. Report at 172. Judge Wiseman pointed out that when questions arose as to whether the later of two requests for information from foreign governments was redundant or inconsistent with the first requests, the government attorneys had several options. They could have complied with the requests; they could have sought a protective order if they felt the requests were redundant or oppressive; or they could have contacted defense counsel by telephone for a clarification. As the master stated:

> Each of these options would have had the advantage of providing the defense either with the requested

> information, or with notice of the misunderstanding. Although I believe that the consequences were unintended, the course they took—silently imposing a limitation on the earlier interrogatory—almost certainly misled [defense counsel] and endangered Mr. Demjanjuk's ability to mount a defense.

S.M. Report at 175.

III.

The Special Master was disturbed by the fact that the government attorneys continued to be less than forthcoming with materials from foreign sources after agreeing at a pretrial hearing in the denaturalization case that the government had superior access to such materials and should make every effort to obtain them and furnish them to the defense.

A.

Undisclosed materials from the former Soviet Union and Poland form the principal basis for Demjanjuk's contention that OSI attorneys engaged in misconduct that amounted to fraud. The Supreme Court of Israel reversed Demjanjuk's conviction as Ivan the Terrible and acquitted him based largely on statements of Ukrainian guards at Treblinka who clearly identified Ivan Marchenko as Ivan the Terrible. The Israeli Supreme Court found that these statements raised a reasonable doubt as to Demjanjuk's guilt even though eighteen Jewish survivors of Treblinka and one German guard there had identified him as "Ivan the Terrible" from photographs made in 1942 and 1951.

The government did not have all of the statements relied upon by the Israeli Supreme Court in its possession during the various proceedings against Demjanjuk in this country. Some of the statements came from Russian and

Ukrainian sources after the breakup of the Soviet Union. Demjanjuk maintains, however, that during its investigation prior to the denaturalization trial the government did obtain from official sources in the Soviet Union and Poland documents and statements that should have raised doubts about Demjanjuk's identity as Ivan the Terrible, and some of which named Marchenko as the wanted "Ivan." Because the OSI attorneys consistently followed an unjustifiedly narrow view of the scope of their duty to disclose, and compartmentalized their information in a way that resulted in no investigation of apparently contradictory evidence, Demjanjuk and the court were deprived of information and materials that were critical to building the defense.

B.

We briefly describe the claims related to five of these undisclosed documents and groups of documents, indicating with parentheses the date each came into the possession of one or more attorneys at OSI:

1. **The Fedorenko Protocols (1978)**

   This evidence consists of statements received from the former Soviet Union including the statements of two former Treblinka guards, Malagon and Leleko, who discussed the presence of a gas chamber motorist named Marchenko. Both the Leleko and Malagon statements are by Treblinka guards who demonstrate great familiarity with the operations and the operators of the gas chambers of Treblinka. They both name a man other than the accused as the notoriously cruel "Ivan the Terrible" who ran the motors of the gas chambers. Excerpts from the Leleko and Malagon statements are annexed to this opinion as Appendices 3, 4 and 4-A respectively. Also accompanying this

evidence was a list of guards transferred out of the Trawniki, Poland training camp on which Demjanjuk's name did not appear. The survivors identified Ivan the Terrible as one of the Ukrainian operators of the Treblinka gas chambers ("motorist"), who was especially cruel and committed atrocities upon the Jewish victims as he herded them into the lethal chambers.

2. **The Danilchenko Protocols (1979)**

This evidence consists of statements received from the former Soviet Union including a second statement from the former Treblinka guard Malagon who stated that an "Ivan Demedyuk or Ivan Dem'yanyuk" worked at Treblinka as a cook, that a guard named Marchenko operated the gas chambers, and who stated that the man he knew as "Ivan Demedyuk or Ivan Dem'yanyuk" was not pictured in the photospread shown to him. Jt.App. 178, 179. Danilchenko, a guard at the Sobibor, Poland death camp, stated that Demjanjuk was a fellow guard at Sobibor and that they were transferred from Sobibor to Flossenburg, Germany together. Respondent's Appendix 221-22. Although these statements are inculpatory to the extent they place Demjanjuk at the Sobibor and Flossenburg concentration camps, Demjanjuk contended that he was entitled to have them produced because they were exculpatory with respect to the Treblinka "Ivan" claims and would permit him to refute the claim that he was at Sobibor and Flossenburg.

3. **The Dorofeev Protocols (1980)**

This evidence received from the former Soviet Union consists of statements of five Soviets who served at

the Trawniki, Poland training camp for guards. Only one individual recalled the name Demjanjuk and although he identified two of Demjanjuk's photos in a three-photograph photospread, he qualified his identification by stating that his recollection of Demjanjuk was poor. Three of the others stated that transfers between camps were routed through Trawniki which served as a distribution center. Jt.App. 155. Again, this evidence has both inculpatory and exculpatory elements, but Demjanjuk argued that he was entitled to the statements demonstrating that four of the five Trawniki witnesses were unable to identify him and that the fifth was very tentative.

4. **"Polish Main Commission" List (1979)**

This evidence consists of an article published by the Polish Main Commission, a government body, which partially lists names of known guards at Treblinka. The name Ivan Marchenko appears on the list. Demjanjuk's name does not appear on the list. The Commission conducted an official investigation of the activities carried on at Treblinka in connection with a more extensive investigation of Nazi war crimes in Poland. Jt.App. 502, 556. At the time OSI received this list of more than 70 names containing Marchenko's name, but not that of Demjanjuk, it already had Leleko's statement identifying "Nikolai" and Marchenko as two different people who operated the gas chambers. (Nikolai was identified in documents later received from former Soviet sources as Nikolai Shalayev, who gave a statement in 1950 that he and Marchenko were the two gas chamber operators. This evidence was admitted by the Israeli Supreme Court.) Demjanjuk contended that any attorney considering the Polish list in combination with the Leleko state-

ment would have realized that information from foreign governments pointed to Marchenko, not Demjanjuk, as Ivan the Terrible and should have produced them in response to Questions 1 and 2.

An OSI attorney, George Parker, who was lead counsel in the denaturalization case prior to his resignation in 1980, prepared extensive notes describing and commenting on the evidence in that case sometime before the trial. Jt.App. 152, 167. In those notes he stated that Leleko had named "Nickolay" and Marchenko as motorists and that Marchenko had sword-cut women's breasts, one of the atrocities charged against Demjanjuk as Ivan the Terrible. Before the Special Master, Parker testified that he did not make the connection, because Malagon's statement indicated that Nikolai or Nickolay was Marchenko's first name. Thus, the other guard was Ivan, and, he believed, Demjanjuk. Transcript, Nov. 12, 1992, at 80.

5. **Otto Horn Interview Memoranda (1979)**

This evidence consists of "Reports of Interview" from an OSI investigator, Bernard Dougherty, and a historian, George Garand, written in 1979 contemporaneously with an interview of Otto Horn, a former SS guard at Treblinka, at which Horn identified Demjanjuk as a Treblinka guard. Although Horn identified Demjanjuk in a photospread, the investigator and historian both wrote in separate memoranda that this identification occurred only after Horn noted that Demjanjuk's photo appeared in both of the two photospreads and while Demjanjuk's photo from the first photospread lay facing up during his examination of the second photospread. Horn later testified that the photo in the first spread was not visible to him when he made the identification from the second.

These memoranda were addressed to Arthur Sinai, Deputy Director of OSI. A routing slip from Sinai directed "Stacey" to make two copies of one of these reports and forward one to Norman Moscowitz. Jt.App. 586. At that time Moscowitz was working with Parker on the Demjanjuk denaturalization case. He became lead counsel following Parker's resignation, and actually tried the case.

The statements were not produced to Demjanjuk or disclosed to the district court in the denaturalization proceedings when that court received a videotaped deposition of Horn taken some time after the initial identification from the two photospreads. In the videotaped deposition Horn stated that he did not see the two photospreads at the same time—that the first one was put away out of his sight before he examined the second one. The district court stated that it found "no aberrations in the conduct of these identifications which may be said to detract from the identifications Horn made." 518 F.Supp. at 1372.

Moscowitz testified before the Special Master that he did not read the investigator and historian's reports prior to the denaturalization trial, although he did not deny receiving them. Transcript, Jan. 14, 1993, at 91-93. Demjanjuk claims that the OSI attorneys committed misconduct and fraud on the court in presenting Horn's videotaped identification testimony without producing the reports that detailed a highly suggestive identification procedure. Relevant portions of the Dougherty and Garand reports are annexed to this opinion as Appendices 5 and 6, respectively.

C.

There is a further consideration with respect to the Fedorenko Protocols. Following the district court's judg-

ment in the denaturalization case, Norman Moscowitz who was then chief trial counsel in that case, wrote a letter to Demjanjuk's counsel, John Martin, with a copy to the trial judge. Jt.App. 147. In this letter Moscowitz stated that documents had been received from the Soviet Union (the Dorofeev Protocols) just before trial and that OSI, for various reasons, had not disclosed or produced them to Demjanjuk's counsel. The letter characterized these materials as "further incriminatory information and support for the government's case." The letter also stated that Demjanjuk was being advised of the existence of these documents in order to make "the record of discovery complete."

Demjanjuk filed a motion for a mistrial, which the district court treated as a motion for a new trial. The district court held a hearing on the motion on May 4, 1981. Demjanjuk's attorneys argued that the Dorofeev information would have been valuable to the defense, that four of the five former Trawniki guards had failed to identify Demjanjuk while only one had identified him. Counsel asserted that it would have been important for the defense to contact these men, particularly to learn if they had been issued identification badges like the "Trawniki card" relied upon by the government. The expert witness at the trial who had testified that the card appeared to be authentic had stated that the one exhibited there was the only one he had ever seen, though he was a Holocaust historian.

The government argued that it had no agreement or duty to supplement answers to interrogatories and requests. Even if there was a duty to produce the documents, the government asserted, Demjanjuk was not prejudiced by this oversight. During the government's argument, attorney Moscowitz told the court that he was perfectly willing to give the defense the witness' statements "as every-

thing else." At this time Demjanjuk's counsel only had the letter describing the contents of the statements, not the Dorofeev statements themselves.

Chief Judge Battisti ruled that the government had a duty to provide the names of the five witnesses before or during the trial. He then ordered government counsel to turn over copies of the statements to the defendant and to the court, and recessed the hearing until Demjanjuk's counsel and the court had an opportunity to review them. Following the recess, the district court heard further argument and then asked for briefs from the parties before adjourning the hearing. Jt.App. 767. The court ultimately ruled that the Dorofeev materials were cumulative and in fact supported the government's arguments that Demjanjuk had been at Trawniki and that Trawniki was a training center for guards assigned to all of the extermination camps, including Sobibor as well as Treblinka. 518 F.Supp. at 1384-86.

Demjanjuk argues that, given the district court's ruling that the government had a duty to disclose and produce the Dorofeev Protocols, Moscowitz should have realized that the same duty applied to the Fedorenko Protocols, which also came from the Soviet Union. Though Moscowitz represented that his post-trial letter disclosing the existence of the Dorofeev Protocols was written in order to make the record of discovery complete, he still did not disclose or produce the Fedorenko documents, which had been in OSI's possession since 1978.

In his testimony before the Special Master, Moscowitz admitted reading the Fedorenko documents prior to the denaturalization proceedings. Neither he nor Parker, who also read them, felt that they supplied any help in the Demjanjuk cases. According to the master, these documents disappeared in the winter of 1981 after the denaturalization trial and only resurfaced in 1991 in response to a

Freedom of Information Act case by Congressman James Traficant of Ohio. At oral argument before this court, government counsel stated the Fedorenko documents didn't actually disappear: "They were just put back in the Fedorenko files. They came with the Fedorenko case and when the Demjanjuk case was over, they went back to their Fedorenko file."

It is hard to credit this explanation. The Fedorenko file, particularly the Leleko and Malagon statements, contain significant evidence tending to show that a person other than Demjanjuk was in fact "Ivan the Terrible of Treblinka." The record contains copies of a letter dated October 23, 1978, from the General Counsel to Martin Mendelsohn, chief of litigation in the "Special Litigation Unit" (SLU) of the Department of Justice, predecessor to OSI. Jt.App. 215-17. The letter discusses the necessity of winning the Demjanjuk case, and has as attachments all of the SLU's memoranda on Demjanjuk. Among these memoranda is one from Parker and Moscowitz to the State Department requesting assistance in obtaining further information from the Soviet Union. The memorandum notes that the Soviets had sent materials in June 1978 relating to the investigation of Fedorenko (the Fedorenko Protocols), and continues: "Please thank the [Soviet] Ministry for sending these materials which have been very useful." Jt.App. 218. The October 23, 1978 letter shows that a copy was placed in the Demjanjuk file. It seems clear that even if the Fedorenko documents were "just put back in the Fedorenko files," anyone working with the Demjanjuk files had the substance of those documents, if not the documents themselves, available.

There were clear signals that the Fedorenko documents were significant in the Demjanjuk investigation. As we have noted, the Fedorenko Protocols contained, inter alia, the statements of Soviet citizens Malagon and Leleko,

both guards at Treblinka, who identified Marchenko as an operator of the gas chamber. Leleko's statement clearly said that there were two Ukrainian operators of the gas chambers, "Marchenko and Nikolay" and identified Marchenko as the "motorist" who committed some of the very atrocities with which Demjanjuk was charged. Leleko said that Marchenko mutilated Jewish victims, cutting off breasts of women. Demjanjuk argues that this evidence provided the strongest possible support for their basic contention in all the proceedings that Demjanjuk was the victim of misidentification. Though the Treblinka survivors who identified Demjanjuk as Ivan the Terrible probably believed they recognized him from the two photographs exhibited to them, it had been 30 to 40 years since any of them had their last opportunity to observe the Ukrainian guard Ivan Grozny. On the other hand, Leleko's statement was made immediately after the war. The Israeli Supreme Court considered more eyewitness survivor identifications than the American courts; yet, it found that statements made to Soviet authorities identifying Marchenko as "Ivan" raised sufficient doubt about the identification of Demjanjuk to require reversal of Demjanjuk's conviction and his release. It seems clear that the American courts considering Demjanjuk's fate should have had those documents that were in OSI's possession in 1981 that pointed to Ivan Marchenko as Ivan the Terrible.

IV.

After working on the Demjanjuk case for several years, OSI attorney George Parker became convinced that OSI lacked sufficient evidence that Demjanjuk was Ivan the Terrible of Treblinka. On February 28, 1980, Parker wrote a memorandum entitled "Demjanjuk—A Reappraisal," addressed to Walter Rockler, Director, and Allan

Ryan, Deputy Director of OSI, setting forth his doubts. He urged the addressees to read the memorandum and be prepared to make a decision about how to proceed with *Demjanjuk* (the denaturalization case had been pending for more than two years and was nearing trial) in the near future. This memorandum is annexed hereto as Appendix 7.

A.

Parker's memorandum discussed the background of the Demjanjuk investigation, which began when attorneys in the SLU became aware of a brief reference to Demjanjuk at Sobibor in a book called *Lest We Forget*. The book also referred to a document later denominated the "Trawniki Card," containing a photograph identified as being that of Ivan Demjanjuk. It was only after Treblinka survivors who were interrogated by Israeli police identified the person pictured on the card as a guard at Treblinka rather than at Sobibor that the SLU shifted its focus and began preparing a case against Demjanjuk as Ivan the Terrible. All other evidence, including the statements of Danilchenko and two other Ukrainian guards questioned by Soviet authorities, identified Demjanjuk as a guard at Sobibor and Flossenburg, but not at Treblinka.

Furthermore, Parker's memo pointed out, both the Polish and Soviet governments had compiled lists of guards at Treblinka, and Demjanjuk's name appeared on neither one, though "[t]he two Ukrainians who incessantly worked at the gas chambers were well known." This portion of the memorandum concludes: "Given these circumstances it is disturbing, as Norman Moscowitz has pointed out repeatedly, that Demjanjuk's name does not appear on either list."

After reviewing the available admissible evidence and the "flaws" with the Treblinka evidence, the memorandum sets forth Parker's views of "Strategic Options; Ethical Responsibilities" of OSI as he sees them. This section of the memorandum begins with these words:

> We have little admissible evidence that defendant was at Sobibor yet serious doubts as to whether he was at Treblinka. Even if we may be comforted that we may have the right man for the wrong act, the ethical cannons [sic] probably require us to alter our present position.

The memorandum then sets forth four options and Parker's recommendation as to each.

Option 1 would be to maintain the status quo, that is, to "[p]roceed with the Treblinka case as presently plead." (The denaturalization complaint did not mention Sobibor or Trawniki, only Treblinka.) Assuming canons of ethics that caution against prosecutors going forward in a criminal case in which they have serious doubts apply to the denaturalization case, Parker "strongly recommended" against this option. Parker recognized that a denaturalization proceeding is technically a civil rather than a criminal action, but expressed the view that the consequence to a defendant who loses such a case—deprivation of citizenship—is so severe that this stricture of the canons should be followed.

Option 2 would be to strike claims that Demjanjuk was at Treblinka and substitute claims that he was at Trawniki and Sobibor. Parker described this course of action as "tactically suicidal" and "a strategic blunder," primarily because it placed too much reliance on the Trawniki Card.

Option 3 would be to dismiss the case—at least temporarily—and attempt to beef up the Sobibor evidence. The memorandum recommended against this option because

of "largely political" negative factors, and the possibility that the court might not permit refiling.

Option 4 would be to amend the pleadings to add allegations that Demjanjuk served at Sobibor and Trawniki in addition to the allegation that he was Ivan the Terrible of Treblinka. This would shift the focus from testimony of Treblinka survivors describing the heinous crimes of Ivan the Terrible to a mere showing that Demjanjuk was a Russian POW trained by the Germans as a guard, who served as a guard at an extermination camp. Parker did not make a recommendation with respect to Option 4, but repeated his opinion that a change in course was absolutely required by ethical considerations.

Parker's superiors eventually decided to amend the pleadings to add allegations about Sobibor and Trawniki, but to proceed with the case on the basis of proving that Demjanjuk was Ivan the Terrible and to rely principally on photo identifications by Treblinka survivors. Parker resigned from the Department of Justice before the denaturalization trial and Norman Moscowitz took over as lead attorney for OSI.

B.

The Special Master found that the Parker memorandum is "authentic." S.M. Report at 100-01. This was an issue, because no one in OSI could locate it; Parker produced a copy of the memorandum and cover letter on October 8, 1992, in proceedings before the master.

Rockler testified that he could not remember receiving the memorandum. Ryan testified that he could not have received it, or he would have done something about it. The master stated that Ryan's testimony should be taken "with a grain of salt," and we agree with this assessment. Moscowitz testified that he did not receive the memorandum, but was aware of Parker's doubts about the identifi-

ations of Demjanjuk by survivors of Treblinka. The master found that there was a meeting shortly after the memorandum was written at which the question of amending the pleadings in the Demjanjuk case was discussed. Although there was considerable inconsistency in the testimony of the attorneys who attended the meeting, the master found that all were telling the truth to the extent they remembered the meeting at all. The master further concluded that Rockler found no irreconcilable discrepancies in the Demjanjuk evidence and that the evidence in hand was sufficient to go forward. On that basis, Parker's views were rejected by Parker's colleagues within OSI. S.M. Report at 103-09.

The master absolved Moscowitz of blame for not sharing Parker's ethical concerns and proceeding to prosecute the denaturalization case with the Ivan the Terrible allegations as its centerpiece. Moscowitz testified that he had concluded that while Demjanjuk's primary duties were at Treblinka, the Trawniki training camp was also a transfer point for guards. Thus, it was not impossible for Demjanjuk to have been at Treblinka at times the survivors claimed they saw him operating the gas chambers and committing other atrocities there, and to have served at Sobibor at other times. S.M. Report at 113-18.

The "most striking aspect" of the Parker memorandum, according to the master, "is its complete silence regarding the references [in the Fedorenko documents] to a man named Merchenko at the gas chambers." S.M. Report at 112. Parker's doubts were based on the apparent impossibility of Demjanjuk's having been a guard at both Sobibor and Treblinka during the relatively brief time both were in operation, and his uneasiness about the survivor identifications so long after the events. Parker did not make the Marchenko connection. Moscowitz testified that when he became aware of the evidence identifying

Marchenko as Ivan the Terrible, he assumed that Demjanjuk had adopted Marchenko (a common Ukrainian name, and Demjanjuk's mother's maiden name) as an alias. The problem with this explanation is that Moscowitz also relied on the Trawniki card containing Demjanjuk's name and photograph as significant evidence that he was Ivan the Terrible of Treblinka. It is hard to understand how he could have been sent from Trawniki to Treblinka as Demjanjuk and then assumed the name Marchenko while working there. Surely the meticulous Germans in charge at Treblinka would have noticed the discrepancy.

In his memorandum, Parker wrote that adopting Option 4, amending the pleadings to add Sobibor and Trawniki allegations, would be "simply a ruse to avoid the ethical problems" identified in Option 1. The master found that amending in this way was not a ruse because Moscowitz and others believed in good faith that transfers did take place through Trawniki between camps and that Demjanjuk had served at both Treblinka and Sobibor. S.M. Report at 123.

While recognizing the significance of the Parker memorandum as a document which raised important questions about the handling of the Demjanjuk case, the Special Master concluded that it was not a "smoking gun" insofar as his inquiry was concerned. The master held that because OSI attorneys acted on the basis of good faith belief in Demjanjuk's guilt as Ivan the Terrible their disagreements with Parker's conclusions were irrelevant with respect to the issue of fraud on the court. S.M. Report at 117. While we agree that the Parker memo alone would not be a sufficient basis for a finding of fraud on the court, it raised a clear warning that there were ethical perils in continuing to prosecute Demjanjuk as Ivan the Terrible. When his superiors and colleagues at OSI refused to heed his warning, Parker resigned.

V.

A.

The government argued in its brief to the Special Master that mere nondisclosure can never be fraud on the court. The master rejected the argument as a misinterpretation of this court's statement in *H.K. Porter Co. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1118 (6th Cir.1976), that "[a]llegations of nondisclosure during pretrial discovery are not sufficient to support an action for fraud on the court." The government quoted this statement out of context. When the context is examined, it is clear that the court in *Porter* was concerned with a claim of fraud based on an attorney's failure to disclose documents not requested by opposing parties that pertained to confidential disclosures from a client. The master stated, correctly we believe, that it would be error "to exclude from the definition of fraud on the court intentional, fraudulent nondisclosure during discovery." S.M. Report at 187-88.

The Special Master set forth the elements of fraud upon the court as consisting of conduct:

1. On the part of an officer of the court;
2. That is directed to the "judicial machinery" itself;
3. That is intentionally false, wilfully blind to the truth, or is in reckless disregard for the truth;
4. That is a positive averment or is concealment when one is under a duty to disclose;
5. That deceives the court.

As shown by his description of the third element, and repeated in his opinion, the master held that the intent requirement "is satisfied by proof of actual intent to defraud, or wilful blindness to the truth, or of a *reckless disregard for the truth*." S.M. Report at 185-86, 190 (emphasis added).

B.

We have trouble squaring this definition with the master's ultimate conclusion. The master stated that "a careful reading of Mr. Demjanjuk's discovery requests demonstrates that he asked for virtually every piece of evidence that is at issue in these proceedings," but the government did not provide the evidence because it believed it was under no duty to do so. S.M. Report at 204. The government attorneys had the same obligation as the master to give these requests a "careful reading." The master also faulted Demjanjuk's attorneys for failing to pursue every lead provided by the responses that the government did make. That may be a correct assessment as to some leads, but Demjanjuk's attorneys were depending on government attorneys to root out information in the possession of foreign nations and to provide it. This was so because only the government has the contacts and resources necessary to obtain information from foreign governments, and because a government attorney agreed to do just that at a pretrial hearing before a magistrate. S.M. Report at 157.

This case involves more than discovery obligations, however. Ryan testified that he had stated many times that OSI had a policy and practice of turning over exculpatory information even if it had not been requested in discovery. Transcript, Jan. 29, 1993, at 32-40. The other OSI attorneys testified that they knew of no such policy.

While the denaturalization case was before the Supreme Court on Demjanjuk's petition for certiorari, Demjanjuk received from private sources a copy of the August 1979 letter from a Polish official to Martin Mendelsohn concerning the report of the Polish Main Commission. Demjanjuk requested information about the Polish report. Moscowitz responded and sent a part of the Commission materials. John Martin, Demjanjuk's attorney, immedi-

ately wrote to Allan Ryan, then director of OSI, requesting copies of the document described in the letter. OSI attorney Bruce Einhorn drafted a response and sent it to Ryan for approval. This second response stated that "all relevant and discoverable documents in the Government's possession have been provided to you under the Federal Rules of Civil Procedure." The letter went on to decline the request for "further discovery." The master found that this letter was sent to Martin with a copy to Judge Battisti, apparently with Ryan's approval. S.M. Report at 135-36. These responses do not square with Ryan's professed policy. The OSI letter is couched in terms of the requirements of the discovery rules and limiting production to documents specifically requested, not one of disclosing all exculpatory information.

C.

The Special Master based his ultimate conclusion that Demjanjuk failed to prove fraud on the court almost exclusively on his finding that the OSI attorneys acted in-good faith. While he stated that they were not reckless, he did not discuss this finding at all. Instead, he emphasized his finding that "[t]hey did not intend to violate the Rules or their ethical obligations . . . . they did not misstate facts or the law as they understood them, and did not make statements in ignorance while aware of their ignorance. Although they were blinded to what we may now perceive to be the truth, they were not wilfully blind." S.M. Report at 206.

The quoted findings are based largely on credibility determinations. Although we might not agree with each finding, giving them the required deference, we cannot find them clearly erroneous. The conclusion that the OSI attorneys were not reckless, however, stands on a different footing. Given the Special Master's finding of no

deliberate or wilful failure to disclose information arising from an evil motive, we believe the type of reckless disregard to be examined in this case is the second type described in the Restatement (Second) of Torts § 500, comment (a):

> Recklessness may consist of either of two different types of conduct . . . In [the second type], the actor has . . . knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so. An objective standard is applied to him, and he is held to the realization of the aggravated risk which a reasonable man in his place would have, although he does not himself have it.

Such recklessness can and should be determined from an objective examination of the actions of the parties in a particular set of circumstances. We will undertake such an objective examination, accepting as true that no OSI attorney deliberately withheld from Demjanjuk or the court information that he believed he had a duty to disclose even though the withholding itself was deliberate.

VI.

A.

[3] The attitude of the OSI attorneys toward disclosing information to Demjanjuk's counsel was not consistent with the government's obligation to work for justice rather than for a result that favors its attorneys' preconceived ideas of what the outcome of legal proceedings should be. The master found that the OSI attorneys operated on the premise that Demjanjuk was Ivan the Terrible and that this belief caused them to be "inadequately skeptical" of their case when confronted with evidence pointing to Marchenko as Ivan Grozny. S.M. Report at 202-03. We do

not believe their personal conviction that they had the right man provided an excuse for recklessly disregarding their obligation to provide information specifically requested by Demjanjuk (as found by the master) the withholding of which almost certainly misled his counsel and endangered his ability to mount a defense (as found by the master).

B.

The OSI attorneys acted with reckless disregard for their duty to the court and their discovery obligations in failing to disclose at least three sets of documents in their possession before the proceedings against Demjanjuk ever reached trial.

1. The Fedorenko Protocols should have been disclosed. They consisted of information provided by a foreign government that supplied some support to Demjanjuk's basic claim from the beginning—that he was a victim of misidentification. The statements of the two former guards at Treblinka identified one of the Ukrainians who operated the gas chambers as "Marchenko." In his statement, taken in 1945 near the end of World War II, the guard Leleko named Nikolai and Marchenko as the "motorists" and stated that Marchenko had cut women's breasts with his sword. In addition, the protocols contained the transcription of a detailed taped interrogation of Fedorenko conducted in 1973 by Soviet officials. Fedorenko stated that he remembered two guards at the gas chambers, Nikolay and Ivan. Two Jewish survivors, Rosenberg and Epstein, had also described two operators of the gas chambers called Nikolai and Ivan. Marchenko's given name was Ivan.

The guard Malagon also identified Marchenko as a motorist in a 1978 statement. He referred to him, however, as "Marchenko, Nickolay," providing support

for the OSI theory that Marchenko was the Nikolai described by some survivors and Demjanjuk was the notorious Ivan. This theory was weakened, however, by the fact that Marchenko's name appeared on the list of Treblinka personnel furnished by the Soviet government and Demjanjuk's name did not appear. This same witness, Malagon, identified Demjanjuk's photograph as that of a cook at Treblinka, not as Ivan the Terrible when he was interrogated on October 2, 1979.

The information in the Fedorenko Protocols would have bolstered Demjanjuk's contention that he was not Ivan Grozny of Treblinka, and would have provided information pointing toward Marchenko as the notorious Ukrainian. The information would have assisted the district court as well. The court heard no evidence in support of Demjanjuk's claim of misidentification beyond his own denial. This information would have shown the court that there was evidentiary support available, and in the government's possession, that supported that denial.

2. The list of Ukrainian guards at Treblinka furnished to OSI by the Polish government was certainly exculpatory. In 1982 Demjanjuk's attorney advised OSI Director Allan Ryan that he had learned of 1979 correspondence between the director of the Polish Main Commission Investigating Nazi Crimes in Poland and OSI attorney Martin Mendelsohn and requested copies "[p]ursuant to discovery motions and interrogatories . . . ." Jt.App. 149. Attorney Moscowitz responded on August 17, 1992, enclosing copies of the reports from Poland. Moscowitz advised that OSI was furnishing the material "as a matter of courtesy and not under any obligations of discovery, which ended long ago." Jt.App. 150.

Demjanjuk's attorney persisted, asking for copies of any other documents received from foreign governments (a duty to furnish such documents existed from the time

of Demjanjuk's first set of interrogatories, the master found). Attorney Bruce Einhorn replied for OSI that "all relevant and discoverable documents in the Government's possession have been provided to you under the Federal Rules of Civil Procedure." The letter also advised that OSI had undertaken no inquiry to determine whether other documents being sought had already been provided "or indeed whether such documents even exist." Jt.App. 152.

The 1979 letter from the Polish Main Commission advised that the Commission had no data concerning Demjanjuk. Jt.App. 502. Among the documents forwarded with the director's letter was a list of known Ukrainian guards who had worked at Treblinka. Both Fedorenko and Marchenko's names appeared on the list. Demjanjuk's name did not appear.

Both Parker and Moscowitz, the two OSI attorneys most involved in preparing the Demjanjuk denaturalization case, saw the material from the Polish Main Commission. Parker testified that he thought the material had no value in the Demjanjuk case, and that he did not notice Marchenko's name. Moscowitz testified he thought it did not relate to the Demjanjuk case. This was a strange conclusion, given the fact that the director of the Commission sent the material in response to a request from OSI for information concerning Demjanjuk and two other individuals. Jt.App. 502.

The Polish Main Commission material would not have established conclusively that Demjanjuk was not a guard or motorist at Treblinka. There were approximately 100 Ukrainians there at one time or another. Nevertheless, the defense could have argued from the absence of Demjanjuk's name that surely the Polish investigation would have turned up the name of Treblinka's most notorious guard and included that person's name on the list. If Allan Ryan's proclaimed policy of furnishing everything had

been followed, it is clear that the Polish documents would have been furnished in 1979, before the denaturalization trial, not three years later.

3. Otto Horn's identification of Demjanjuk as Ivan Grozny from photo spreads was extremely important government evidence at the denaturalization trial. Horn was a German guard who had been stationed at Treblinka. He was tried for war crimes in 1964 or 1965 and acquitted. His evidence was presented in the denaturalization proceedings in the form of a videotaped deposition taken in Berlin on February 26, 1980.

Demjanjuk's counsel objected to testimony on the videotape concerning the identification from photographs on the specific ground that OSI personnel had visited Horn three months earlier, in November 1979, and conducted a photo identification procedure in the absence of Demjanjuk's attorneys. Moscowitz responded that Demjanjuk's counsel had full opportunity to cross-examine Horn when the deposition was taken in 1980.

What neither Judge Battisti nor Demjanjuk's counsel knew was that the contemporaneous reports of the 1979 Horn interview by the OSI investigator and historian directly conflicted with Horn's testimony at the deposition that when he finally identified Demjanjuk's photograph in the second spread he could not see the first set of pictures. Yet, the reports both stated that Horn was unable to identify Demjanjuk's photo in the first spread and only did so while examining the second spread and noticing the resemblance between the Demjanjuk photo in that set and the Demjanjuk photo in the first spread, which was lying face-up where Horn could see it as he examined the second set.

As we have noted, Chief Judge Battisti overruled Demjanjuk's objections to the Horn video deposition and found that there were "no aberrations" in the process by

which Horn identified a photograph of Demjanjuk as Ivan. We believe that if Demjanjuk's attorneys had had the investigator and historian's reports of the first session, with their strong indication of a suggestive identification procedure, they could have conducted a cross-examination of Horn at the video-taped deposition that would have raised serious questions about the witness' identification.

Both the district court and Demjanjuk's counsel were entitled to have these reports produced. Moscowitz, who was the lead attorney at the denaturalization trial, testified before the Special Master that he never read the Dougherty and Garand reports before the trial. This, despite the fact that Sinai, to whom the reports were addressed, clearly directed that a copy be made and sent to Moscowitz. If Moscowitz did not read the reports, knowing he planned to introduce the video deposition at the trial, this failure constituted "reckless disregard for the truth."

OSI was not a large office. We can find no excuse for such casual treatment of information that could cast doubt on the validity of important testimony. Moscowitz was present at the first session with Horn, but testified that he looked away during the actual identification, leaving that to the investigator and historian. He did this, he said, in order to avoid the possibility of being called as a witness at the denaturalization trial when the deposition to be taken a few months later would be introduced. Not having witnessed the identification himself, we can find no reasonable explanation in this immense record for his failure to read and acknowledge the importance of the contemporaneous reports of the trained investigator and historian, nor can we understand how Sinai determined that two reports addressed to him should be routed to Moscowitz without even reading them.

VII.

We consider whether the conduct outlined herein constitutes fraud on the court or attorney misconduct sufficiently serious to require corrective action on our part.

A.

Fraud on the court is a somewhat nebulous concept usually discussed in civil cases. No court system can function without safeguards against actions that interfere with its administration of justice. This concern must be balanced against the necessity for finality of court judgments; thus, only actions that actually subvert the judicial process can be the basis for upsetting otherwise settled decrees.

Professor Moore's definition is frequently cited:

> Fraud upon the court should . . . embrace only that species of fraud which does or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication, and relief should be denied in the absence of such conduct.

7 *Moore's Federal Practice and Procedure* ¶ 60.33. Cases dealing with fraud on the court often turn on whether the improper actions are those of parties alone, or if the attorneys in the case are involved. As an officer of the court, every attorney has a duty to be completely honest in conducting litigation. Professor Moore emphasizes this element of fraud in his treatise:

> [W]hile an attorney should represent his client with singular loyalty, that loyalty obviously does not demand that he act dishonestly or fraudulently; on the contrary his loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court. And when he departs from that standard in the conduct of a case he perpetrates fraud upon a court.

Id. The author cites two Supreme Court decisions that illustrate the role of attorney actions in the fraud on the court analysis, Moore distinguishes between *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944), in which the Supreme Court did find fraud, and *U.S. v. Throckmorton,* 98 U.S. 61, 25 L.Ed. 93 (1878), in which the Court did not find fraud. While the actions taken in both cases were similar—false documents were put before the court—the attorney was implicated in *Hazel-Atlas* as one of the perpetrators, while the attorney in *Throckmorton* was not. 7 *Moore's Federal Practice* at 60-358-59. See also *Serzysko v. Chase Manhattan Bank,* 461 F.2d 699 (2d Cir.1972), where the court of appeals as part of its finding of no fraud on the court, pointed out that none of the offending party's attorneys were involved in the alleged fraud. 461 F.2d at 702 n. 1.

When the party is the United States, acting through the Department of Justice, the distinction between client and attorney actions becomes meaningless. The Department acts only through its attorneys. Although there are cases holding that a "plan or scheme" must exist in order to find fraud on the court, we agree with Judge Wiseman that a scheme, based on a subjective intent to commit fraud, is not required in a case such as this. Reckless disregard for the truth is sufficient.

B.

The respondents complain that Demjanjuk seeks to hold them to the constitutional standard in criminal cases enunciated in *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), even though all proceedings against Demjanjuk have been civil actions. The Supreme Court held in *Brady* that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either

to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. The Special Master stated that he believed the *Brady* rule should govern, but confined his analysis to fraud on the court in a civil context, because the Supreme Court had never stated that the *Brady* rule applies in civil cases.

(1)

We believe *Brady* should be extended to cover denaturalization and extradition cases where the government seeks denaturalization or extradition based on proof of alleged criminal activities of the party proceeded against. If the government had sought to denaturalize Demjanjuk only on the basis of his misrepresentations at the time he sought admission to the United States and subsequently when he applied for citizenship, it would have been only a civil action. The government did not rest on those misrepresentations, however. Instead, the respondents presented their case as showing that Demjanjuk was guilty of murder.

The OSI prosecutors knew that *Brady* requires disclosure of exculpatory information in criminal cases. The Director of OSI, Mr. Ryan, testified that it is "fundamentally unfair" not to follow the *Brady* principle in OSI cases and that he intended for the office to follow this principle of full disclosure of exculpatory material. (Ryan Tr. at 37.) It is not sufficient to say, as the Special Master concludes, that no prosecutorial misconduct occurred under the *Brady* principle because no particular individual at OSI has been proved to have acted in "bad faith" with the express intent of suppressing exculpatory evidence.

In *Brady* itself, the Court stated that the failure to disclose material information is a due process violation "irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland,* 373 U.S. 83, 86, 83 S.Ct. 1194,

1196, 10 L.Ed.2d 215 (1963). Otherwise, the prosecutor can proclaim that his heart is innocent and his failures inadvertent, a claim hard to disprove, while at the same time completely disregarding his duty to disclose.

The Court has also made plain that the prosecution cannot escape its disclosure obligation by compartmentalizing information or failing to inform others in the office of relevant information. In *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), the government made the same "the-right-hand-did-not-know-what-the-left-hand-was-doing" argument as it makes here. The Court was quick to reject this excuse as a justification for withholding exculpatory material. The Court pointed out that "the prosecutor's office is an entity and as such it is the spokesman for the government." The Court held that the prosecutor's office – here OSI – is responsible as a corporate entity for disclosure.[2]

---

[2] The full paragraph in which this rule is expressed is as follows:

> In the circumstances shown by this record, neither DiPaoloa's authority nor his failure to inform his superiors or his associates is controlling. Moreover, whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government. See Restatement (Second) of Agency § 272. See also American Bar Association, Project on Standards for Criminal Justice, Discovery and Procedure Before Trial § 2.1(d). To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.

405 U.S. at 154, 92 S.Ct. at 766.

(2)

The record is replete with evidence that Allan Ryan was considering extradition of Nazi war criminals to Isreal even before Demjanjuk's denaturalization become final. When the event occurred, the government did not deport Demjanjuk; instead, it sought his extradition for trial as Ivan the Terrible pursuant to Israel's request.

The consequences of denaturalization and extradition equal or exceed those of most criminal convictions. In this case, Demjanjuk was extradited for trial on a charge that carried the death penalty. OSI is part of the Criminal Division of the Department of Justice. The OSI attorneys team with local United States Attorneys in seeking denaturalization and extradition, and they approach these cases as prosecutions. In fact, in correspondence and memoranda several of the respondents refer to their role in the Demjanjuk case as prosecutors. We believe the OSI attorneys had a constitutional duty to produce "all evidence favorable to an accused [Demjanjuk]," which the Special Master found he had requested and that was "material . . . to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady,* 373 U.S. at 87, 83 S.Ct. at 1196.

Thus, we hold that the OSI attorneys acted with reckless disregard for the truth and for the government's obligation to take no steps that prevent an adversary from presenting his case fully and fairly. This was fraud on the court in the circumstances of this case where, by recklessly assuming Demjanjuk's guilt, they failed to observe their obligation to produce exculpatory materials requested by Demjanjuk.

VIII.

Several other factors revealed by this record require brief discussion.

A.

Although the Special Master found that pressures from outside OSI did not influence the respondents' failure to disclose required information, the presence of such pressure cannot be gainsaid. In August of 1978 Congressman Eilberg, the Chairman of an important committee, wrote then Attorney General Bell a letter insisting that Demjanjuk be prosecuted hard because "we cannot afford the risk of losing" the case.[3] The trial attorney then in charge of the case, Mr. Parker, wrote in his 1980 memorandum that the denaturalization case could not be dismissed because of factors "largely political and obviously

---

[3] The letter reads, in its entirety, as follows:

August 25, 1978
Honorable Griffin B. Bell
Attorney General
Department of Justice
Washington, D.C.

Dear Mr. Attorney General:

Reports have reached me that deficiencies have become apparent in the preparation of the case of *U.S. v. Demjanjuk*, a denaturalization proceeding against an alleged Nazi war criminal now living in Cleveland, Ohio.

I wish to express my strong concern over the possible inadequate prosecution of this case. A repeat of the recent Fedorenko adverse decision to the government's case in Florida would nullify and gravely jeopardize the long and persistent efforts of this Subcommittee in ridding this country of these undesirable elements. Lack of preparation and a deep realization of the importance of these proceedings may have cost the government its decision in this case. We certainly would regret seeing this happen again.

The creation of a Special Litigation Unit within INS [predecessor of OSI] was established to bring expertise and organization to this project.

This Unit should be fully entrusted with these cases.

I would strongly urge you to place the direction of the proceedings of the DEMJANJUK case in the hands of the Special

considerable." Other lawyers in OSI wrote memos discussing this case as a political "hot potato" that if lost "will raise political problems for us all including the Attorney General." (Mendelsohn, then the Director of the office, to Crosland, September 26, 1978, Pet.Exh. 113.) Mr. Ryan, Director of the office, wrote the Assistant Attorney General of the Criminal Division in 1980 that OSI had "secured the support in Congress, Jewish community organizations, public at large for OSI – press coverage has been substantially favorable and support from Jewish organizations is now secure," but he went on to say that "this support can't be taken for granted and must be reinforced at every opportunity." (Ryan Tr. at 88.) Mr. Ryan also testified that "in 1986, which was the year before the [Israeli] trial [of Demjanjuk], I went to Israel for about 10 days on a lecture tour, that was sponsored by the Antidefamation League . . . ." (Ryan Tr. at 90.) It is obvious from the record that the prevailing mindset at OSI was that the office must try to please and maintain very close relationships with various interest groups because their continued existence depended upon it.

B.

The "win at any cost" attitude displayed by some of these record documents and statements contrasts sharply with the attitude and actions of the Israeli prosecutors, who were under domestic political pressures themselves.

Litigation Unit. We cannot afford the risk of losing another decision.

With best wishes.

Sincerely,

JOSHUA EILBERG

Chairman

Pet. Supp. App. (1992), at 182.

But for the actions of the Israeli prosecutors, the death sentence against Demjanjuk probably would have been carried out by now. He would have been executed on a charge for which he has now been acquitted.

The Israeli prosecutors did not learn of the exculpatory evidence from Russia until after the accused was found guilty and sentenced to death in the Israel trial court. They had prosecuted the case over many months and obtained the conviction and death sentence. The Israeli prosecutors then learned that there was Russian information suggesting that the charges against the accused may be false. Instead of withholding the information, the prosecutors travelled to Russia to investigate the matter thoroughly. They marshalled the exculpatory evidence, brought it back to Israel; and in the face of extremely strong popular feelings against the accused, publicly turned it over to the Supreme Court of Israel. Basically, the Israeli prosecutors confessed error in the face of intense political pressure to get a conviction. Relying on this newly discovered exculpatory evidence developed by the prosecutors, the Supreme Court of Israel reversed the conviction which those same prosecutors had obtained five years earlier.

IX.

We have considered the possibility of treating Demjanjuk's claims as moot in view of the fact that he has now been acquitted and ordered released by the Supreme Court of Israel. Upon reflection, however, we are convinced that the collateral consequences of being found by the district court to be Ivan the Terrible require corrective action.

The petitioner was extradited in 1986 on the basis of evidence in the denaturalization case that led to a finding that he was the notorious Ivan. After a lengthy trial followed by conviction and a death sentence, he spent

more than seven years in an Israeli prison. Although he was treated humanely there, he was under a sentence of death until the Israeli Supreme Court in 1993 ordered his acquittal and eventual release.

The United States Supreme Court dealt with the collateral consequences of a judgment in a criminal case with similarities to the present case in *Fiswick v. United States,* 329 U.S. 211, 222, 67 S.Ct. 224, 230, 91 L.Ed. 196 (1946). In *Fiswick,* the Court held that an appeal was not moot even though the defendant had completed his prison sentence before the appeal reached the High Court. The case involved an alien convicted of conspiracy to defraud the United States for concealing his membership in the Nazi party when registering with the Immigration and Naturalization Service. Although Fiswick was released before his case could be heard, the Supreme Court held that the harmful effects flowing from the conviction precluded mootness. The Court reasoned that a conviction for lying about Nazi involvement "stands as ominous proof that [Fiswick] did what was charged and puts beyond his reach any showing of ameliorating circumstances or explanatory matter that might remove part or all of the curse." 329 U.S. at 222, 67 S.Ct. at 230. If a conviction for merely "lying about Nazi involvement" causes such collateral consequences, surely being found by a court and convicted for being one of the most notorious perpetrators of Holocaust atrocities deserves the same consideration. The Supreme Court has found collateral consequences sufficient to overcome suggestions of mootness in many other cases. *E.g., Ginsberg v. New York,* 390 U.S. 629, 633 n. 2, 88 S.Ct. 1274, 1277, 20 L.Ed.2d 195 (1968); *Pollard v. United States,* 352 U.S. 354, 77 S.Ct. 481, 1 L.Ed.2d 393 (1957). See also *York v. Tate,* 858 F.2d 322 (6th Cir.1988) (habeas corpus petition not mooted by prisoner's release).

CONCLUSION

We attempt to mitigate the collateral consequences of the extradition order only. As did the Special Master, however, we have considered the actions of the OSI attorneys in the denaturalization case. The extradition order was based largely on the district court's finding in the denaturalization case that Demjanjuk was Ivan the Terrible.

The court has not considered charges against Demjanjuk other than those related to the claim that he was Ivan the Terrible of Treblinka. Neither have we considered Demjanjuk's contention that the other grounds for denaturalization and deportation should be reconsidered because the "Ivan" charges overshadowed all the proof in the two earlier proceedings.

Acting pursuant to Fed.R.Civ.P. 60(b)(6) and the All Writs Act, 28 U.S.C. § 1651, we reopened the habeas corpus case in which we denied relief from the extradition order to determine whether that proceeding had been tainted by fraud on the court or prosecutorial misconduct that required our intervention. See *Harris v. Nelson,* 394 U.S. 286, 299-300, 89 S.Ct. 1082, 1090-1091, 22 L.Ed.2d 281 (1969). We also acted pursuant to our inherent power to protect the integrity of the judicial process within this Circuit. The Supreme Court has recognized a court's inherent power to grant relief, for "after-discovered fraud," from an earlier judgment "regardless of the term of [its] entry." *Hazel-Atlas Glass Co. v. Hartford Empire Co.,* 322 U.S. 238, 244, 64 S.Ct. 997, 1000, 88 L.Ed. 1250(1944). See also *Chambers v. NASCO, Inc.,* – U.S. –, –, 111 S.Ct. 2123, 2132, 115 L.Ed.2d 27 (1991). Rule 60(b) recognizes this authority as well in noting that "[t]his rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment,

order, or proceeding . . . or to set aside a judgment for fraud upon the court."

Our sole concern in these proceedings, which began with entry of our order of June 5, 1992, has been to determine whether any acts or omissions of Department of Justice attorneys resulted in the district court and this court improvidently approving extradition of Demjanjuk to Israel in this habeas corpus action. We express no view with respect to charges that have been made, but not adjudicated, to the effect that Demjanjuk engaged in other activities during the Nazi period that are proscribed by the criminal laws of any nation.

For the reasons set out herein we vacate the judgment of the district court and the judgment of this court in the extradition proceedings on the ground that the judgments were wrongly procured as a result of prosecutorial misconduct that constituted fraud on the court.

APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-3435

JOHN DEMJANJUK, PETITIONER-APPELLANT

v.

JOSEPH PETROVSKY, ET AL., RESPONDENTS-APPELLEES

ORDER

Before: MERRITT, Chief Judge; KEITH, Circuit Judge; and LIVELY, Senior Circuit Judge.

The petitioner-appellant, John Demjanjuk, was extradited to the State of Israel for trial of a capital offense, the commission of war crimes during World War II. In a previous decision of this court in this case, 776 F.2d 571 (6th Cir. 1985), we declined to stop the extradition by issuing a writ of habeas corpus. Our previous study of the record and numerous recent press reports and articles in the United States indicate that the extradition warrant by the Executive Branch may have been improvidently issued because it was based on erroneous information. Consideration should be given to its validity and to whether this court's refusal to grant the petition for writ of habeas corpus was erroneous.

In our previous decision we said that the extradition should be limited:

The district court clearly certified that Demjanjuk

> Demjanjuk was subject to extradition solely on the charge of murder. Though some of the acts which Demjanjuk is charged with may also constitute other offenses listed in the treaty, he may be tried in Israel only on that charge.

776 F.2d at 583.

Pursuant to the authority stated in rule 40, Fed.R.App.Proc., pertaining to the rehearing of causes previously heard and Rule 60(b)(6), Fed.R.Civ.P., pertaining to relief from judgments previously entered, the Court, upon its own motion, makes the following orders with respect to the prior proceedings concerning the extradition warrant heretofore issued in this case under Chapter 209, title 18 (§ § 3181-3195), United States Code:

1. The United States, on or before July 15, 1992, shall file with the Court a brief describing any items of evidence of any kind, of which it has knowledge, tending to show that the petitioner-appellant, Demjanjuk, is not the "Ivan the Terrible" who committed war crimes at the Treblinka death camp, in particular murder, as described in 776 F.2d 571 (6th Cir. 1985), together with a statement of approximately when agents of the United States first learned of each such item of evidence.

2. On or before July 25, 1992, the petitioner-appellant shall file a brief describing affidavits, depositions or other statements of witnesses in his possession (which are not described in the government's brief referred to in paragraph 1 above), which tend to show that a man known as Ivan Marchenko was the "Ivan the Terrible" referred to in paragraph 1.

3. On or before August 1, 1992, the parties should file simultaneous briefs stating their respective position on the question whether the Court should reconsider its earlier decision concerning the issuance of a writ of habeas cor-

pus in this case, including the question whether the court should remand the case to the district court for a further evidentiary hearing respecting the case.

4. The Federal Public Defender for the Northern District of Ohio is hereby appointed to represent the defendant, provided the petitioner-appellant or the members of his immediate family in the United States do not object to such appointment, and provided further that he is qualified for such representation under 18 U.S.C. § 3006A.

5. An oral hearing on this matter is set for Tuesday afternoon, August 11, 1992, at 2:30 P.M.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

APPENDIX 2

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 85-3435

JOHN DEMJANJUK, PETITIONER-APPELLANT

v.

JOSEPH PETROVSKY, ET AL., RESPONDENTS-APPELLEES

ORDER

Before: MERRITT, Chief Judge; KEITH, Circuit Judge; and LIVELY, Senior Circuit Judge.

Pursuant to orders of this court entered on June 5, 1992, and June 18, 1992, counsel for the parties appeared for oral argument after having previously filed briefs and appendixes. At the commencement of oral argument the panel, speaking through Chief Judge Merritt, stated that the essential issue joined by the parties in their briefs is whether this court mistakenly affirmed the district court's denial of John Demjanjuk's habeas corpus petition. See *Demjanjuk v. Petrovsky,* 776 F.2d 571 (6th Cir. 1985), *cert. denied,* 475 U.S. 1016, 106 S.Ct. 1198, 89 L.Ed.2d 312 (1986). The Chief Judge then stated that the court's inquiry concerns whether lawyers from the Department of Justice engaged in prosecutorial misconduct by concealing or withholding from the district court and this court evidence in their possession that John Demjanjuk was not the notorious Ukrainian guard known as "Ivan the Ter-

rible" who operated the gas chambers at the Treblinka, Poland Nazi death camp. The "bedrock question" for the court, Judge Merritt continued, is whether the failure of the attorneys to disclose such exculpatory information constituted fraud upon the court that misled this court into allowing Demjanjuk to be extradited.

The case was ably and extensively argued by counsel and, at the conclusion of oral argument, was taken under submission by the court. Upon consideration the court concludes that further proceedings are required as set forth here.

I.

Before outlining the additional proceedings, we dispose of the Department of Justice's contention that this court lacks jurisdiction to conduct the present inquiry. The Department argues that we have no power to review our 1985 judgment, particularly in view of the fact that Demjanjuk is now in Israel, having been convicted by an Israeli court for violation of Israeli law. We disagree. This court is proceeding under its inherent power to grant relief, for "after-discovered fraud," from an earlier judgment "regardless of the term of [its] entry." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244, 64 S.Ct. 997, 1000, 88 L.Ed. 1250 (1944). Furthermore, nothing requires this court to follow the "cumbersome and dilatory procedure" of sending this issue back to the district court for decision. *Id.* at 249.

The fact that a federal court has the inherent power "to vacate its own judgment upon proof that a fraud has been perpetrated upon the court" was reaffirmed by the Supreme Court at its 1990 term. See *Chambers v. NASCO, Inc.*, – U.S., –, –, 111 S.Ct. 2128, 2132, 115 L.Ed.2d 27 (1991). The Court warned that, "[b]ecause

of their very potency, inherent powers must be exercised with restraint and discretion." *Id.* Mindful of this admonition, we have determined to make every effort to be certain that we have as complete a record as possible before acting upon the serious charges made by the petitioner in this case.

II.

Counsel for the Department of Justice conceded that "mistakes were made." This admission was based upon the undisputed fact that the Department had in its possession prior to the extradition proceedings statements and documents indicating that John Demjanjuk was not "Ivan the Terrible," but that another Ukrainian guard at Treblinka, Ivan Marchenko, was the operator of the gas chambers whom the prisoners referred to by this sobriquet.

It is alleged by the petitioner that this information was known to attorneys within the Department of Justice who were involved in the Demjanjuk denaturalization, deportation and extradition proceedings, but that none of the information was produced to Demjanjuk's counsel in response to numerous interrogatories and requests, or revealed to the court. The attorneys so identified at this time are Allan Ryan, Norman Moscovitz, George Parker and John Horrigan. The first three worked within the Department in its Office of Special Investigations (or its predecessor), while Horrigan served as an assistant United States Attorney for the Northern District of Ohio. All four attorneys were involved in the proceedings against John Demjanjuk.

III.

In order to procure information that we deem essential

for reaching a decision on the issue before us, the court hereby appoints the Honorable Thomas A. Wiseman, Jr., Judge of the United States District Court for the Middle District of Tennessee, as Special Master of this Court pursuant to Fed.R.Civ.P. 53(c). This reference requires the Master to take the testimony of attorneys Ryan, Moscovitz, Parker, and Horrigan, if available, and to receive such other evidence as he may determine to be relevant and material to the issue under submission. The Master shall have all of the powers granted to such offices under Fed.R.Civ.P. 58(c). After completing his duties pursuant to this order of reference, the Master will prepare a report on the matters covered by this order. He will file the report with the clerk of this court and serve on each party notice of the filing and a copy of the report together with a transcript of all proceedings and of the evidence and any original exhibits as provided in Fed.R.Civ.P. 53(e)(1).

Entered by order of the court.

By: Clerk

APPENDIX 3

EXCERPT

From the Record of Interrogation of the Defendant

February 20, 1945. I, Lieutenant EPPEL', Investigator of the Fourth Department of the "SMERSH" Directorate of Counterintelligence of the Second Belorussian front interrogated as defendant –

> LELEKO, Pavel Vladimirovich, born in 1922, native of the village of Chaplinka, Chaplinka district, Nikolayev Region, Ukrainian, citizen of the USSR.
>
> The interrogation began at 10.10 a.m.

Question: What was the purpose of the Treblinka camp?

Answer: A camp is not a quite precise definition of what was there in reality. This was not a camp, because not counting the servicing crews, nobody was housed there, but it was an especially equipped factory for the mass extermination of people.

Question: How long were you in service in the Treblinka camp?

Answer: I was in service in the Treblinka camp for one year, from September 1942 to September 1943.

Question: What position did you hold there?

Answer: In the Treblinka camp I held the position of a guard.

Question: Where was the Treblinka camp located?

Answer: The Treblinka camp was located some 500 meters from the Malkinia-Kosow highway, about two-three km from the Treblinka railroad station, at the edge of a forest. To the West of the camp, some two km away, there is the village of Kutaska.

Question: Describe the exterior appearance of the camp?

Answer: The Treblinka camp is divided into two parts: Camp no. 1, or as the prisoners called it, the "death camp", and the worker's camp, called Camp no. 2. The camps were situated at a distance of some 2-3 km from each other.

Question: What did the "death camp" look like?

Answer: The "death camp" was located on an area of about 7-8 hectares, which was fenced in by two rows of barbed wire reaching 3 (three) meters in height. Beyond the barbed wire stretched a continuous line of metallic anti-tank obstacles enmeshed in barbed wire. The entire area of the camp, in the shape of an irregular quadrangle, was divided into three sections by rows of barbed wire. The barbed wire was intertwined with bushes and branches in order to prevent the possibility of seeing from one section into the other.

Question: What did the first section of the "death camp" look like?

Answer: The first section of the "death camp" contained all the service buildings of the servicing personnel. There were there four barracks housing the Russian and Ukrainian guards, three barracks housing the Germans who directed the mass extermination of the people. The commander of the camp and his secretary lived in a separate barrack. Right by the barbed wire separating the first section from the second and the third stood the barrack surrounded by barbed wire in which were housed some 1000 prisoners condemned to death. They were called the "worker crew" and were used to service the camp. In addition to the above mentioned barracks there were also two barracks one of which served as storage area and bakery in which the prisoners worked, and the other as a dining room for the Russians. A branch road led from the Malkinia-Kosow highway to the first section of the camp.

Question: What did the second section of the "death camp" look like?

Answer: The second section of the "death camp" was the receiving point of the doomed prisoners. A railroad branch extended here from Treblinka village. Near the railroad stood two wooden barracks in which the belongings and clothing of the people to be exterminated were stored. One of the barracks had been given the appearance of a railroad station. A wooden facsimile of a clock had been nailed above it. Prior to each arrival of a fresh batch of doomed people, one of the prisoners climbed on the roof of the barrack and moved the arms of the clock to make it show the time corresponding approximately to the actual time. A wooden sign representing a hammer and saw was nailed above the clock. Below the clock was a small panel on which the sechedule [sic] of departure of trains for L'vov, Rovno, Dnepropetrovsk, Tarnopol" [sic] and other Ukrainian cities was written in several languages. Still further down were two small windows above one of which was a sign that read "cashsinr," and above the other, another sign that read "station master". All this decoration was made in order to delude the people brought here to die. To complete the illusion, there were also large posters reading "Palestine waits for you", "the Ukraine will give you work and bread" and other slogans and appeals.

* * *

Two more barracks stood about 70-100 meters from the above mentioned two barracks situated by the railroad branch and serving as storage space for belongings and clothing of the doomed prisoners. One of these two barracks served as an undressing place for the women. The men were undressed near the other barrack, right there on the street, winter and summer. The food, belonging [sic] and clothing taken from the doomed prisoners were stored

inside this second barrack. Inside the women's undressing room there was also a so-called "cashier's office" where the women were ordered to hand over their money, jewelry, and valuable [sic] for "safekeeping". Beyond the "cashier's office" booth was a fenced in area where the hair of the women was cut. Men handed over their valuables and money also in a special "cashier's office" situated not far from the second barrack. Both barracks were fenced in by barbed wire.

A road led from the undressing rooms [sic] the third section of the "death camp" and terminated at the building where the extermination of people took place.

Question: What did the third section of the "death camp" look like?

Answer: The road from the undressing rooms, fenced on both sides by barbed wire intertwined with branches led to the gas chamber building where people were exterminated with gas obtained from running diesel engines. As the people directed to the gas chambers were told that they were being taken to a bath-house, the outward appearance of the gas chamber building was also made to resemble a bath house. It was a single storied brick building, its exterior covered with plaster and whitewashed. It was about 25 meters long and 15 meters wide. The entrance to the building was ornate and there were stucco moldings.

Flowers grew right by in long boxes. There was no door at the entrance. Instead of it there was a heavy hanging made from a rug. Beyond it started a narrow passage which ended at the opposite wall. To the right and to the left of the passage there were five doors that closed hermetically and led into the special chambers where the poisoning took place. The chambers were about six meters long and as wide, about two to five-three meters high. In the center of the ceiling there was an electric light bulb in which there was no wiring and there were two "shower"

heads through which poisonous gas was fed into the chamber.

The walls, floor and ceiling of the chamber were of cement. On the opposite side to the entrance door there was another, likewise hermetically closing door, through which the bodies of the poisoned people were removed. As many as 500 men, women and children were pushed into the chambers indiscriminately. Eight chambers out of the ten existing in the gas chamber building were used to poison people. In the two remaining ones, there were two powerful German engines, about 1.5 meters high—two engines in all. Each engine fed gas to four death chambers. Some 20 meters from the above mentioned gas chamber building stood the building of the old gas chambers, which contained only three gas chambers. This building functioned until 1943. But as it was unable to handle the enormous number of people brought by the Germans to the "death camp", the new, large gas chamber building that I have described above was built. After it came into use, the old one was no longer utilized. An incinerator for the burning of bodies was situated about 10 meters beyond the large gas chamber building. It had the shape of a cement pit about one meter deep and 20 meters long. A series of furnaces covered on the top with four rows of rails extended along the entire length of one of the walls of the pit. The bodies were laid on the rails, caught fire from the flames burning in the furnaces and burned. About 1000 bodies were burned simultaneously. The burning process lasted up to five hours. Not far from the gas chamber building, also in the third section, there was a barrack housing the working-crew composed of doomed prisoners and which comprised up to 500 persons.

* * *

Question: What was the system of mass extermination of people in the German death camp of Treblinka?

Answer: Two to three trainloads of doomed prisoners arrived daily at the Treblinka railroad station. Each train consisted of 60 cars. The train was brought in three installments into the second section of the "death camp". Twenty cars were brought in every half hour. As soon as the cars crossed the barbed wire, the guard was changed. The policemen escorting the train remained outside the camp and left on the locomotive to fetch the next batch of prisoners. The railroads [sic] cars brought into the camp were immediately unloaded by the guards. We started to unload the cars with the help of the so-called "blue crew" consisting of doomed prisoners wearing a blue armband on the sleeve. Those arriving were told that they must first go to the bath house and will then be sent further to the Ukraine. But the sight of the camp, the enormous flaming pyre burning at one end of the camp, the suffocating stench from decomposing bodies that spread form some 10 km around and was particularly strong within the camp itself, made it clear what the place really was. The people chased out of the cars with whips guessed immediately where they had been brought; some attempted to climb over the barbed wire of the fencing, got caught in it, and we opened fire on those who were trying to escape and killed them. We tried to quiet down the fear-crazed people with heavy clubs. After all those who were able to walk had been unloaded, only the ailing, the killed and the wounded remained in the railroad cars. These were carried by the prisoners belonging to the "blue crew" into the so-called "infirmary", the name given to the place where the ailing and the wounded were shot and the dead were burned. This place became particularly crowded when the prisoners marked for death who were brought in the railroad cars attempted to commit suicide. Thus, in March 1943 there arrived a train in which half of the prisoners cut their throats and hands with razors. While unloading was

going on, the prisoners cut themselves with knives and razors before the eyes of us, the policemen, saying: "anyhow you will kill us". The majority of those who did not die of self-inflicted wounds were shot. After the unloading, all those who could stand on their feet were chased toward the undressing place. There the women were separated from the men and pushed into a special barrack, while the men were told to undress right there outside another barrack. During the first years of the existence of the camp, women and men undressed together in the same barrack. But it happened once that the prisoners attacked the "chief of the working crew" in the undressing barrack. Somehow the man managed to escape from there. Several policemen and Germans immediately rushed in. One of the Germans started firing into the crowd from his submachine gun. After they had stopped shooting, the Germans and the policemen started to beat with clubs and whips those who survived. After this incident, men were assigned to a special place in the open air in which to undress, by the barrack, across from the women's undressing place. Pushed by the clubs of the Germans and the policemen, the men threw off their clothing, having first handed their valuables and money to a special "cashier's office". The women were obliged to remove their shoes before entering the undressing place. They were forced to remove all their clothing under the supervision of German policemen and prisoners of the so-called "red crew" [sic] Those who resisted were whipped. Very often the Germans and the policemen tore off and cut off the clothing of those who did not want to undress or undressed too slowly. Many women begged to be allowed to keep at least some clothing on their persons, but the German, [sic] smiling cynically, ordered them to undress "to the end". The policemen or the workers threw to the ground and undressed those who refused to do so. The

undressed women were told to hand over all their valuables and money to the "cashier's office". After this the women were driven in groups to another part of the barrack, where 50 prisoners—"hairdressers" were working. The women sat on a long bench and the "hairdressers" cut off their hair. The cut hair were [sic] packed in large bags and sent by trainloads to Germany. One of the Germans told me that in Germany they are used to fill mattresses, also for soft upholstery. He said that this hair make [sic] very good mattresses and the Germans buy them willingly.

After their hair was cut the women were sent in batches to the third section of the camp, to the "bath house", but in reality to the gas chamber to be exterminated there. Before entering the gas chamber building they passed along a long path bordered on both sides with a high fence made of barbed wire and branches. Along the edge of the path stood policemen and Germans. Each one held a whip or a club. I stood repeatedly on the edge of this path with other policemen and drove along with a whip the women and the men into the gas chamber building. Many women were not quite sure that they would not be exterminated and in order to have some means of subsistence in the future, they hid some valuables on their persons. To prevent this, the Germans placed special controllers in the center of the path. When they noted that a woman walked along the path holding her legs close together, she was stopped at once and cynically examined, and if anything was found on her, she was beaten almost to death. The men walked more quietly down this path. Several times I heard how one, speaking to another said: "Why are you weeping? Do you believe you can arouse compassion in those Germans?" Frequently we could hear cries of "Hail Stalin!" "Hail the Red Army!" To us Russians guards, they said: "Today you exterminate us, and tomorrow the Germans will be killing you".

When the procession of doomed people approached the gas chamber building, MARCHENKO and Nikolay, the motorists of the gas chambers shouted: "Walk faster, or the water will become cold!" Each group of women or men was pushed from behind by some German and very frequently by Franz, the camp commander himself, escorted by dogs. As they approached the gas chambers, the people started to recoil in horror, sometimes they tried to retrace their steps. Then whips and clubs were used. Franz immediate [sic] ordered his dog to attack the naked people. Being trained for this, it grabbed them by their genitals. Aside from the motor operators who had dogs with them, there were five or six Germans near the gas chambers. With whips and clubs they chased people into the passage of the gas chamber building and then into the gas chambers. The Germans and the motor operators then competed as to atrocities with regard to the people to be killed. MARCHENKO for instance, had a sword with which he mutilated people. He cut off the breasts of women.

When the chamber was filled to capacity, the Germans or the motorists came to the door and started beating up the naked people with a rubber whip and at the same time set their dogs against them. The prisoners shrank away into the depth of the chamber yielding place to more prisoners. Such a pressing-in occurred several times so that some 700 to 800 people could be crowded into the not-so-large chambers. When the chambers were filled to the very limit, the Germans started to throw in the children left by the women either in the undressing place or more frequently outside the gas chamber building. As the ceiling of the gas chambers was very low, the children thrown into the chamber hit the ceiling and then, disfigured, sometimes with broken heads, fell on the heads of the prisoners.

When loading of the chambers was completed, they were sealed off by hermetically closing doors. Motorists MARCHENKO and Nikolay started the motors. The gas produced went through the pipes into the chambers. The process of suffocation began. Some time after the motor had been started, the motorists looked into the chambers through special observation portholes situated near each door, in order to determine how the process of extermination was going on. When asked what they say, the motorists answered that the people were writhing, crushing each other. I also tried to look through the porthole, but for some reason could see nothing. Gradually the noise in the chambers died down. Some fifteen minutes later the motors were stopped and there was an unusual silence.

While extermination of this batch of prisoners went on, a new bath of condemned people arrived into the camp. The entire process started all over again.

APPENDIX 4

RECORD

Of Interrogation of Witness

18 March 1978

City of Zaporozh'ye

On instructions from the Procuratorate of the USSR concerning the request made by organs of Justice of the USA, and in accordance with the requirements of Article 85, 167 and 170 of the Code of Criminal Procedure of the Ukrainian SSR, Senior Investigator of the Procuratorate of the Zaporozh'ye Region and Senior Councillor of Justice Litvinenko interrogated as witness:

> MALAGON, Nikolay Petrovich, born in 1919, native and resident of the village of Novo-Petrovka, Berdyansk district, Zaporozh'ye Region, citizen of the USSR, Ukrainian, manual worker, married.
>
> The interrogation stated at 3:30 a.m.

* * *

After having completed my training in the Trawniki camp, I was given the rank of "wachman". I remained in the Trawniki camp from October-November 1941 to March 1942 and then, together with ten other wachmans, we were sent to the small town of Zamoscie, where we guarded the property of a colonel. After a month we returned to the Trawniki camp, but of the four companies of guards, nobody was left except the servicing personnel. As I learned later, part of the guards had been sent to the Treblinka concentration camp and the rest to the Belsec and Lublin camps. After some time I was also sent to the Lublin camp where a team of guards (wachman) was being

collected. After about five days some 50 men were assembled and we went to Warsaw where we took on guard duty for an entire train, the cars of which contained Jews: men, women and children. . . . Our team was headed by a certain Komarkin, the first name and patronymic of whom I do not know, but he spoke Polish well. We brought the train with the Jews to the Treblinka camp, which was situated near the station of Treblinka on Polish territory. A one-track railroad extended from the railroad station to the camp. Some of the train's cars were driven into the territory of the camp and part remained at the station. When we arrived to the camp, other guards were already in the cordon and these began to receive the Jews we have brought. From this day I started my service in the Treblinka camp. This camp was created by the Germans with the express purpose of destroying citizens of Jewish nationality. I saw that trains carrying citizens of Jewish nationality: men, women, children, old men and women arrived regularly at the camp. These citizens were driven into a special barrack, where they removed all their clothing and threw their valuables into specially placed suitcases. Then they were chased naked to the gas chambers through special passages made of barbed wire covered with pine branches. Pipes carrying exhaust gas from running diesel motors were installed in the gas chambers and the people inside perished. The dead were then thrown into special pits and later burnt on pyres. This work was performed by special teams composed of individuals of Jewish nationality. In this camp there was also a so-called "infirmary" which was situated near the barrack where the people arriving undressed and not far from the unloading area. The infirmary was in appearance an area fenced in by barbed wire which was camouflaged with pine branches. In this area there was a pit; there were no other constructions on the territory of the infirmary. Those

among the newly arrived were placed in the infirmary who could not reach by themselves the barracks in which they undressed and gave away their valuables. The principal worker in the infirmary was a man by the last name of Rebeka, I do not know his first name and patronymic; he resembled a Jew. This was the man who exterminated in the infirmary the citizens who were ailing and could not walk without help. Rebeka sometimes boasted that he worked so hard that the barrel of his submachine gun had become red. I did not participate personally in the shooting of the Jews brought in, but was only in the cordon, took part in the unloading of the Jews from the train cars, and mostly, together with the team, prepared pine and fir branches that camouflaged the barbed wires, a single line of which extended around the entire camp, and the wire of which were made the passages leading from the barracks to the gas chambers. The barbed wire around the so-called infirmary was similarly camouflaged with branches. I remained in the Treblinka camp at least three or four months and saw that at least one trainload of citizens of Jewish nationality arrived there every day and were then exterminated in the gas chambers and in the infirmary. During this time many Jews died there, but I cannot state the exact number. There were cases when the Jews brought to the camp for extermination made armed resistance: shot from pistols or threw grenades. There was no rioting among the prisoners during my time of service in the Treblinka camp. I heard that some sort of revolt had taken place, but at that time I was no longer employed in the camp.

* * *

I met guard Fedorenko, I do not recall his first name and his patronymic, in the Trawniki as well as in the Treblinka camps. I met him only seldom, because he

served in another platoon. I remember well his person and therefore can identify him on a photograph. In the Trawniki camp Fedorenko was also trained to be a guard (wachman) and wore a special "SS" uniform. After he had completed his training in the Trawniki camp, Fedorenko was given the title of wachman (guard). Each wachman was given 10 marks per month for tobacco. I cannot easily say how Fedorenko came to be in the Trawniki camp undergoing training for the duties of a wachman, because I did not speak with him about this. I did not meet Fedorenko in the Chelm camp and therefore I cannot say from which camp precisely he was sent to be trained in the Trawniki camp. I also met Fedorenko in the Treblinka camp, but I cannot at present remember if he was employed in this camp or brought there [sic] Jewish citizens for extermination. I remember Fedorenko only with the rank of wachman, and I do not know whether he was promoted to higher ranks and what was the attitude of the German authorities toward him. I find it difficult to say whether Fedorenko participated in the extermination of citizens of Jewish nationality in the Treblinka camp because I was not present at this. After the Treblinka camp in 1943 I did not meet Fedorenko again and his subsequent fate is unknown to me.

When the prisoners were brought to the Treblinka camp, the trains were unloaded by Germans and guards with the rank of oberwachman, zugwachman who chased the prisoners from the cars with whips and pistols, beat them and shot at them. I hesitate to say whether Fedorenko participated or not in such actions, because I did not see this. I also did not see Fedorenko shoot down prisoners in the barracks or near the gas chambers. When the trains carrying the Jews arrived, the guards were usually in cordon formation, and the Jews were escorted to the barracks by Germans, while the Jews were exterminated

by the working teams under the supervision of Germans. Near the diesel engines by the gas chambers there worked a guard (wachman) by the name of Marchenko, Nikolay, and wachman Rebeka worked in the so-called "infirmary". I remember that Marchenko wore a leather jacket and carried a pistol. These two guards did exterminate prisoners, who else among the guards took part in the extermination of prisoners I find difficult to say. When one of the prisoners on the unloading area threw a grenade, one of the guards was killed. The other guards standing in cordon formation immediately retaliated against the prisoners who had thrown the grenade, that is they shot them then and there. Who of the guards participated in this action and was Fedorenko among them I do not know. The guards with the rank of oberwachman, zugwachman, and rotenwachman were closer to the Germans, they participated in the unloading of the Jews from the traincars, and in doing so they threw people out of the train cars and shot some of them right there. Together with the Germans they also escorted the prisoners to the barrack where they removed their clothes and handed over their valuables. I cannot personally say how many prisoners were exterminated daily in the camp, but the camp had no facilities to accomodate [sic] the prisoners. All the prisoners who arrived were exterminated on the day of arrival in the gas chambers. The bodies were thrown into pits and later burned. At least a trainload of people arrived everyday, but how many doomed persons it contained I find it difficult to say.

* * *

Interrogation was conducted by Senior Investigator of the Procuratorate of the Zaporozh'ye Region, Senior Councillor of Justice Ya. V. Litvinenko.

APPENDIX 4A

RECORD OF QUESTIONING OF WITNESS

City of Vinnitsa

October 2, 1979

Senior Assistant Procurator of Vinnitsa Oblast' Podrutskiy, on instructions from the Procuracy of the USSR in connection with the request from the organs of justice of the USA for legal aid in the case of Ivan Dem'yanyuk and in accordance with the requirements of Articles 85, 167 and 170 of the Code of Criminal Procedure of the Ukrainian SSR, questioned as a witness:

> Malagon, Nikolai Petrovich, born 1919, native and resident of the village of Novo-Petrovka, Berdyansk Rayon, Zaporozhe Oblast', Ukrainian, citizen of the USSR, laborer.
>
> Questioning began: 9:45 A.M.

* * *

In response to the questioned asked, witness N.P. Malagon stated:

During the Great Patriotic War, I participated with my military unit in the defense of the city of Kiev. In August of 1941 I was wounded in the head and taken prisoner by the Germans together with other soldiers from my unit.

While a prisoner, I was first held in a POW camp in the city of Zhitomir. We were later transferred to a camp in the city of Rovno, and a day later we were transferred in railroad cars to a POW camp in the city of Chemnitz (Poland).

We were held in this camp for approximately two months. In roughly October or November of 1941 we, the POWs, were assembled near the barracks and some man

unknown to me wearing civilian clothing began to select prisoners for work. He selected a total of roughly 60-70 POWs, including myself. This man did not tell us what kind of work we would be doing or where we would do it. The selected POWs and myself were hauled in three trucks to the village of Travniki (Poland) and we were told that in this training case we could be trained as SS guards. . . . [W]e were [eventually] awarded the title of SS guards and issued identification. . . .

A short time later, as part of a group of guards consisting of 20-25 men whose names I do not remember, I was sent to the Lublin camp. We worked cleaning up the area at this camp and stayed there 5-6 days. From the Lublin camp we were sent to the city of Warsaw, where we stayed approximately three days. During these three days I once guarded the Jewish ghetto. From Warsaw we, the guards, escorted a train filled with Jewish civilians to the Treblinka death camp. We were all armed with rifles and live ammunition. When we arrived at the Treblinka camp together with the prisoners, we handed them over to the camp guard. When we arrived at the camp, there were other guards there from the Travniki school.

While at the Treblinka death camp, I met the guard Nikolai Marchenko, who drove a gas chamber van. I do not know where he is at present. In the same camp I met the guard Ivan Demedyuk or Ivan Dem'yanyuk (I do not remember his name precisely). This guard was of average height and heavy build, spoke Ukrainian and had light brown hair. His speech was pure; he pronounced everything well. I do not know where he was from, since I did not talk to him about this. While I was at the Treblinka death camp, he worked there as a cook, preparing food for the guards.

I could identify the guard whom I have named as Demedyuk or Dem'yanyuk from photographs.

In February of 1943 approximately 15 of us, the guards, were transferred to the Belsen camp (Poland). Ivan Demedyuk or Ivan Dem'yanyuk remained at Treblinka. We were at Belsen for approximately five days and, since some of the guards escaped, we were once again returned to Travniki, where we were given special insignia, and then we were sent to the Auschwitz death camp. I served in this camp from March to April of 1943. Then, we were transferred to the Buchenwald death camp, where I served as a guard from April of 1943 through February of 1945. Here, from what other guards (whose names I do not remember) said, I learned that Ivan Demedyuk of Ivan Dem'yanyuk, who had worked as a cook at Treblinka, had been transferred to work as a gas chamber van driver. His later fate is unknown to me. I escaped from the Buchenwald death camp in March of 1945.

I have read the record of the questioning. My statements were recorded faithfully. I have no additions or corrections to make. The questioning was completed at 1:00 P.M.

(Signature) Malagon

Questioned by:

Senior Assistant Procurator,
Vinnitsa Oblast' (Signature) V.L. Podrutskiy,

Copy authentic:

Procurator,
Vinnitsa Oblast' (Signature) G.S. Tarnavskiy.

(OFFICIAL SEAL)

RECORD OF PRESENTATION OF PHOTOGRAPHS FOR IDENTIFICATION OF AN INDIVIDUAL

City of Vinnitsa

October 2, 1979

Senior Assistant Procurator of Vinnitsa Oblast' Podrutskiy, on instructions from the Procuracy of the USSR in connection with the request from the organs of justice of the USA for legal aid in the case of Ivan Dem'yanyuk, in accordance with the requirements of Articles 85, 174 and 176 of the Code of Criminal Procedure of the Ukrainian SSR and in the presence of the witnesses:

Shembereva, Valentina Porfir'yevna, residing at No. 5 Kosmonavtov Street, Apartment No. 37, city of Vinnitsa, and

Voynitskaya, Maria Yakoylevna, residing at No. 113 Pirogov Street, Apartment No. 15, city of Vinnitsa,

presented to witness

Malagon, Nikolai Petrovich, born 1919, native and resident of the village of Novo-Petrtovka, Berdyansk Rayon, Zaporozhe Oblast',

nine photographs of men for identification. The photographs were attached to sheets No. 1, No. 2 and No. 3, designated by numbers and attached to impressions of the official seal of the Procuracy of Vinnitsa Oblast'.

Sheet of photographs No. 1 contains photographs of three men in military uniform and headgear. Sheets of photographs No. 2 and No. 3 contain photographs of men in civilian clothing, without hats. The persons shown in the photographs were not named to the witness.

* * *

After examining the photographs presented to him on sheets No. 1, No. 2 and No. 3, witness N.P. Malagon stated that he could not identify anyone in the photographs. The guard to whom he had referred during the questioning and whom he had called by the name of Ivan Demedyuk or Ivan Dem'yanyuk was not among them.

* * *

The record of the presentation for identification has been read to us. It was recorded faithfully. We have no observations to make on the conduct of the identification or the content of the record.

Witness: (Signature) Malagon
Witnesses: (Signature) Shembereva
(Signature) Voynitskaya

Identification conducted and record compiled by:

Senior Assistant Procurator,
Vinnitsa Oblast' (Signature) V.L. Podrutskiy

Copy authentic:

Procurator,
Vinnitsa Oblast' (Signature) G.S. Tarnavskiy

(OFFICIAL SEAL)

* * *

CERTIFICATE

Photograph No. 3 on sheet of photographs No. 1, photograph No. 1 on sheet of photographs No. 2 and photograph No. 2 on sheet of photographs No. 3 show:

Dem'yanyuk, Ivan Nikolayevich, born 1920, native of the village of Duboviye Makharintsy, Kazatin (formerly Samgorodok) Rayon, Vinnitsa Oblast'.

The persons shown in the other photographs are not involved in the case.

Senior Assistant Procurator,
Vinnitsa Oblast' (Signature) V.L. Podrutskiy

October 2, 1979

Copy authentic:

Procurator,
Vinnitsa Oblast' (Signature) G.S. Tarnavskiy

(OFFICIAL SEAL)

APPENDIX 5

DEPARTMENT OF JUSTICE

TO: Arthur Sinai, Deputy Director, OSI
FROM: Bernard J. Dougherty, Jr.,
Criminal Investigtor
SUBJ: HORN, Otto – Report of Interview
REF: OSI # 42 – DEMJANJUK, Iwan

On November 14, 1979, Otto Horn, German national and citizen of West Berlin, was interviewed at his residence, Yorck-Strasse 66, Berlin, Germany, by Norman Moscowitz, Staff Attorney – OSI, and by the reporting officer. Due to the fact that HORN neither spoke nor understood English, the entire interview was conducted in his native German language, with George Garand – OSI and the reporting officer translating. Theinterview [sic] began at 9:04 a.m.

. . . .

During the course of the questioning concerning the operation of the gas chamber, HORN voluntarily mentioned one "Iwan" (last name unknown), who was one of two Ukrainians who were responsible for the actual operation of the engines which provided the gas for the chambers. HORN was unable to recall the name of the other Ukrainian, describing him as tall and thin, with blond hair, and being approximately 22-23 years of age. HORN further recalled that the two Ukrainians were immediately subordinate to a German, known only as "Schmidt."

HORN described "Iwan" as being of stocky build, black hair cut short, full rounded face, tall with no distinguishing marks on his face. HORN remarked that "Iwan had some technical ability, since he repaired and maintained the gas engine and was known by HORN as

being able to drive an automobile (apparently somewhat of a rare [sic] among the Ukrainians at that time). HORN indicated that he arrived at Treblinka during September, 1942 and stated that "Iwan" was already working there. HORN added that "Iwan", Schmidt, and the other unidentified Ukrainian were the only three individuals who actually worked at the gas chamber, that is, in the operation of the engine. HORN stated that for the period September 1942-September 1943, when he was at Treblinka, "Iwan" worked at the gas chamber every day.

. . . .

[T]he reporting officer advised HORN that there were a series of 8 photographs of caucasian males, which he was requested to review carefully and individually. Each of the photographs depicted an individual in dark clothing. Prior to the interview, care was taken to minimize the amount of uniforms which would be readily discernable in each photograph. Nevertheless on a few photos, a portion of a uniform could be seen. Each picture showed the bust of the subject. The individuals possessed hair of different length, varying physical buildings, and a variety of ages, ranging from the early twenties to the forties. One of the photographs was that of Iwan DEMJANJUK, taken during the early 1940s. HORN studied each of the photographs at length but was unable to positively identify any of the pictures, although he believed that he recognized one of them (not DEMJANJUK) but was not able to indicate where he had met this person or provide his name.

The first series of photographs was then gathered and placed in a stack, off to the side of the table – with that of DEMJANJUK lying face up on the top of the pile, facing HORN. The reporting officer then presented another series of 8 photographs, each depicting the bust of a male caucasian. These photographs showed the individuals in clothing more similar to that normally worn by civilians.

Among the 8 pictures was one of Iwan DEMJANJUK, which had been taken during the early 1950's. This photograph was much better in quality than that presented to HORN in the first series, and depicted DEMJANJUK as having a much fuller and more rounded face. HORN studied this photograph at length, and upon glancing at the earlier picture of DEMJANJUK, identified them as being the same person. As he continued to study the picture from the second set, HORN indicated that it certainly resembled the man that he had known as "Iwan", although he stated that "Iwan" had had somewhat more hair. He further mentioned that the second picture, depicting the fuller face, was much more like that of "Iwan" than the person shown in the first series. After a few more moments of careful study, HORN positively identified the photographs of Iwan DEMJANJUK as being the "Iwan" that he knew at the gas chamber in Treblinka.

. . . .

APPENDIX 6

DEPARTMENT OF JUSTICE

TO: Arthur Sinai, Deputy Director, OSI
FROM: George W. Garand, Historian
SUBJECT: HORN, Otto – Report of Interview
REF: OSI # 42 – DEMJANJUK, Iwan

On the morning of 14 November 1979 Norman Moscowitz, Staff Attorney, OSI, Bernard J. Dougherty, Jr., Criminal Investigator, and George W. Garand, Historian, OSI interviewed the German national Otto HORN at his residence located at 66 Yorkstrasse, West Berlin. The interview began shortly after 0900 and ended shortly before 1000. Mr. Dougherty and the undersigned translated during the interview which was conducted in German since HORN is conversant only in that language.

HORN is 76 years old and lives in a small one-bedroom apartment by himself. His place of residence was meticulously clean and despite his advanced years he conveys the impression of being stable with an excellent recall of events during the time he was stationed at Treblinka. Shown a sketch of the death camp at the beginning of the interview he identified various buildings within the camp without hesitation. He was assigned to the camp for approximately one year, from September 1942 to September 1943, and specifically to the upper part of the camp which housed the gas chambers.

. . . .

[A] German named SCHMIDT or SCHMITT would supervise the actual gassing. Two Ukrainians worked directly under Schmidt. One of these operated the machinery that funneled the lethal gas into the chamber while the other supervised the inmate work detail that removed the bodies from the chamber and

dumped them into two very large pits that had been dug nearby. While the Ukrainians at the train unloading platform rotated between there and the guard towers the two Ukrainians assigned to the gas chamber itself were invariably present at each gassing. He no longer recalled the name of the Ukrainian responsible for overseeing the removal of the bodies, but had a good recall of the one responsible for operating the death machinery. That man's first name was Iwan, a tall heavy set individual approximately in his mid-twenties at the time with shortly cropped hair and full facial features. He never knew Iwan's family name since such names were in any case very difficult to pronounce and the Ukrainians were invariably addressed only by their first names.

. . . .

Initially shown a series of eight photographs of Caucasian males, HORN carefully viewed each photograph that depicted an individual wearing dark clothing. Each one of the photographs showed a frontal view of the individual down to a few inches below the neck. Hair styles of these individuals varies, as did the length of hair, physical stature and age that varied from the low twenties into the forties. One of the photographs depicted IWAN DEMJANJUK as he appeared in the early 1940s. After studying each of the photographs at length HORN initially could not make positive identification of any of the individuals though on one or two occasions he felt that one or two of the individuals shown looked vaguely familiar to him, though he could not recall where and under what circumstances he had met them. At this point the first group of photographs was gathered up and placed on one end of the table with the one depicting DEMJANJUK left facing upward on top of the pile.

Mr. Dougherty thereupon presented a second series of eight photographs to the interviewee, each showing a second group of male Caucasians clothed in what would normally be considered closer to civilian attire than the clothing worn by most members of the first group. One of the photographs in the second group was that of IWAN DEMJANJUK, taken in the early 1950s and depicted DEMJANJUK with a fuller and more rounded face and a more receding hairline. HORN studied this photograph intensively and then, looking at the earlier photograph of DEMJANJUK, identified that individual on both. Nevertheless, he noted some minor differences, such as Iwan having had somewhat more hair at the time he knew him.

. . . .

15 November 1979
/s/ George W. Garand
Historian, OSI

APPENDIX 7

UNITED STATES GOVERNMENT

Memorandum

TO: Walter J. Rockler and Allan A. Ryan, Jr.
Director Deputy Director, Litigation
DATE: February 28, 1980
146-2-47-43 SI
FROM: George Parker
Trial Attorney
SUBJECT: Demjanjuk Memo

I am usually reluctant to reduce to writing that which I have written in the attached memo. I was convinced, however, that it was imperative to focus your attention on the issues that have arisen in handling this case which now necessitate a resolution. The memo obviously needs to be discussed. I am perfectly willing to wait until Norman and John return from Europe and are able to join the discussion. I nonetheless urge you to read this before they return and be prepared to make a decision shortly after they return. I anticipate the judge will set this case for a final pre-trial as early as March 15, 1980.

Memorandum

TO: Walter J. Rockler and Allan A. Ryan, Jr.
Director Deputy Director, Litigation
DATE: February 28, 1980
146-2-47-43 SI
FROM: George Parker
Trial Attorney
SUBJECT: Demjanjuk – A Reappraisal

Background

In 1977, the U.S. Attorney's office in Cleveland, Ohio

filed a denaturalization suit alleging in essence that the defendant should be stripped of his citizenship because he had lacked the requisite good moral character for citizenship on account of his status and actions as a guard at the Treblinka extermination camp. No mention was made in the pleadings of Sobibor or the Trawniki Training Camp. The complaint was filed on the basis of witness statements received from the Israeli police. The statements were credible inasmuch as these same individuals had identified the photograph of Fedorenko as a guard at Treblinka and Fedorenko subsequently admitted he had been a guard. Moreover, any serious doubt as to the witnesses sincerity was assuaged by the circumstance that the INS officials had advised the Israelis that Demjanjuk was thought to have been as [sic] Sobibor. When the first two Treblinka survivors who identified Demjanjuk's photo as a guard at Treblinka were informed by the Israeli investigator that it was believed that the man was at Sobibor, the witnesses insisted that this man had been at Treblinka between 1942-1943.

So at the time of filing, the only indication the government possessed that Demjanjuk was at Sobibor was a brief reference in a book written by Michael Hanusiak called Lest We Forget. It recited that a man named Danilchenko met Demjanjuk as a guard at Sobibor in the spring of 1943, and that subsequently he, along with Demjanjuk was transferred to Flossenburg where they guarded political prisoners. Despite a specific request to the Soviets for information pertaining to Demjanjuk, none was forthcoming.

Demjanjuk at Sobibor—Evidence Developed

The initial allegation against Demjanjuk by Hanusiak included reference to a document—a card issued at the

Trawniki Training Camp bearing a photograph similar to that of Demjanjuk and biographical information identical to that of the defendant's. John Horrigan set out to secure a copy of it. He succeeded in securing a photocopy from private sources. Still we needed a copy from official sources. In August 1979, Norman Moscowitz prepared a request for the card, a statement from Danilchenko and any other witnesses. In January 1980 we received a certified copy of the card from the Soviets plus statments [sic] from Danilchenko and two other guards at Sobibor. The card is identical to that which Horrigan had previously received and which had been published in Hanusiak's book. The card states that Demjanjuk was assigned to Sobibor in the spring of 1943. (Attachment A)

The statement of Danilchenko is consistent with and elaborates upon the information attributed to him by Hanusiak. (Attachment B) He identifies him by name and photo. Most significant, perhaps, is Danilchenko's assertion that at Flossenberg [sic] all the Ukrainian guards were tattooed on their left arm above the elbow with their blood type. Also noteworthy is Danilchenko's claim that Demjanjuk stood taller than six feet.

Demjanjuk has continuously denied being at either extermination camp. Nevertheless, information he has supplied renders this denial dubious when read in the context of this case. First, in his Application for Assistance from the IRO in 1948, he stated that he had been a farmer at Sobibor from 1937 to 1943. (We received this form within the last 8 months.) Second, at his deposition taken on February 20, 1980, he admitted that he had been tattooed by the Germans on his left arm, above his elbow, with his blood type.

The Soviet Union and Poland have each investigated the crimes committed at Treblinka. Each has compiled lists of Ukrainian guards known to have worked at Treblinka.

The two Ukrainians who incessantly worked at the gas chambers were well known (Fedorenko refers to them by first names in his statement to INS officials in February 1976). Given these circumstances it is disturbing, as Norman Moscowitz has pointed out repeatedly, that Demjanjuk's name does not appear on either list.

Admissible Accusatory Evidence

If this case were to be tried in April 1980, we can reasonably expect to present the following evidence to prove that Demjanjuk was trained as a guard by the Germans: (1) He was a Russian soldier attached to the artillery, who received a back injury and was captured by the Germans at a battle at Kerch on the Crimea in either November 1941 or May 1942. (2) He was placed in two successive POW camps, Povno and Chelm where living conditions were horrible and from which the Germans selected POW's with mechanical skills and inoffensive political backgrounds to train as camp guards. (3) He was at Trawniki as indicated by the card received by the Soviets. At Trawniki the Germans trained Ukrainian POW's to be ghetto and extermination camp guards. The POWs did not knowingly volunter [sic] for either the training camp nor their ultimate camp assignments. The signatures of the German officials, Teufel and Streibel, whose names appear on the cards will be authenticted [sic] by Schaefer, a volkdeutsche, who worked at the camp. Unfortunately, Schaefer cannot say he has ever seen this type of card. Consequently, the judge may not even admit the card into evidence, but he probably will. But since we cannot trace its history for the last 38 years, we cannot expect the court to extend too much weight to the card.

We can reasonable [sic] expect to present the following direct evidence that Demjanjuk was at Sobibor: The

Trawniki card which is fraught with problems described above. Danilchenko's statement is obviously hearsay and is in all probability not even a literal statement. Demjanjuk's testimony that his blood type was marked on his arm is of little significance without the admission of Danilchenko's testimony.

Finally, we can reasonably expect to present the following evidence that Demjanjuk was at Treblinka: (1) the testimony of two or three Israeli's and one German, each of whom was initially interviewed by the Israeli Police. Each will identify the defendant as Ivan the Ukrainian who worked at the gas chambers and brutally beat Jews solely on the basis of the defendant's visa photograph taken in 1952. They will state that the photograph bears a striking resemblance to Ivan—that like the photo he had protruding ears, short receding hairline, full face, broad shoulders and stood about 175 cm. (5'8"). The three Israeli witnesses are unwilling to say with absolute certainty that the photo is of Ivan. These three individuals also identified Fedorenko and two of them testified at his trial. (2) The testimony of Otto Horn, a German officer who worked near the gas chambers, who like the Israelis can identify Demjanjuk only by his photographs. (3) The testimony of one American survivor whose identification is also based on photos, and whose statement is considerable [sic] weaker than those of the others. (4) Possibly, the testimony of a survivor living outside the U.S. and Israel who was initially interviewed by American consulate officials. (Now being done)

Flaws with Treblinka Evidence

The reliability of the Treblinka evidence is flawed by the following: (1) Its premised exclusively on the basis of photographs which may at best closely resemble the facial

features of man witnesses knew. Survivors are more likely to recognize the photograph taken in 1952 than that taken in 1942 at Trawniki as man they knew at Treblinka. (2) Several Treblinka survivors, including SS officer Suchomil, insist that Ivan rarely if ever left the camp. Indeed, Suchomil insists that Ivan was at the camp continuously from July 1942 until November 1943, at which time he departed along with Kurt Franz, Suchomil and others for Trieste, for the purpose of establishing other camps. (3) The witnesses fairly consistently, with the exception of Franz, say that Ivan was one of the taller Ukrainians, about 175 cm. whereas Demjanjuk is now and was at the time he applied to enter the U.S. closer to 6'1". (4) The conflicting Sobibor, Flossenberg, and Regensburg statement from Danilchenko which cannot be reconciled with information supplied by Suchomil and others.

Strategic Options; Ethical Responsibilities

We have little admissible evidence that defendant was at Sobibor yet serious doubts as to whether he was at Treblinka. Even if we may be comforted that we may have the right man for the wrong act, the ethical cannons [sic] probably require us to alter our present position. I will now discuss several options theoretically available to us and my recommendation with respect to each.

A. *Maintain Status Quo.* Proceed with the Treblinka case as presently plead. Positive factors: (a) the trial is likely to be scheduled within the next 100 days so it's to [sic] late to ask to change our pleadings. (b) Any attempt to change our pledings [sic] would appear to be a sign of weakenss [sic] or indecisiveness. (c) We believe our witnesses to be sincere in their identification and will be credible witnesses, and (d) even if he was at Sobibor there is some possibility he was also at Treblinka or that he was

committing offensive acts at Sobibor. Negative Factors: (a) We have good reason to believe he was at Sobibor and as such could not have been at Treblinka. (b) Canon 7-103, and Ethical Consideration EC 7-13, 14 of the ABA Code of Professional Responsibility cautions against a public prosecutor going forward in a criminal cause with a case with which he has serious doubts.

Although this is not a a [sic] criminal case per se, I think the deprivation the defendant will suffer if he loses requires us to follow this stricture of the code. If this canon does, in fact, apply, then I must, based upon my knowledge of this case, strongly recommend against this first option.

B. *Amend to Strike Treblinka and Supplement Trawniki and Sobibor.* We submit an extensive alteration to our pleadings. Although this amendment may most closely parallel what we now believe to be the truth, I consider it tactically suicidal. The positive factors are: (a) we believe he was at Sobibor and assisted directly in the persecution of civilians as is reflected in Danilchenko's statement recently received along with two other Soviets who were guards and recall Demjanjuk by name. Their statements dovetail with the Trawniki card and are circumstantially supported by Demjanjuk's assertion to the IRO that he was at Sobibor from 1937 to 1943 and that he was tattooed by the Germans. The negative factors are: (a) the case is reduced to the weight the court will give the Trawniki card. Since the card is primarily a supply card issued to a trainee at Trawniki and only incidentally refers to Sobibor, we cannot reasonably expect the Court to find him culpable of any more that [sic] being a trainee of the Germans by no volitional act of his, and his subsequent failure to report this training to screening officials. I consider this option to be a strategic blunder. Legally and

ethically, our viable choices (assuming my analysis of my ethical responsibilities is correct) are reduced to the following two.

C. *Dismiss the Case—at Least Temporarily.* If we don't believe he was at Treblinka and lack the evidence at the present time to prove that he was at Sobibor as a guard, then dismiss it—at least until the Soviets make Danilchenko available. The negative factors are largely politicl [sic] and obviously considerable, and it should be remembered that the judge may not permit us to dismiss in such a fashion that allows us the possibility to refile against him at a later time alleging his involvement in Sobibor. Finally, we do believe that he was a guard at Sobibor and may therefore lose opportunity to proceed against him entirely.

D. *Amend Pleadings—Add Sobibor and Trawniki to Treblinka Allegations.* Move to amend pleadings to give defendant notice that we now allege that he was at Sobibor as of the spring of 1943 and previously received training as a camp guard. At trial our focus will be substantially altered from that of showing he was the operator of the gas chambers who commited [sic] heinous acts. We will instead focus on the fact that he was a Russian POW who was trained by the Germans as a guard and that he was a guard at an extermination camp. We will not employ survivors of Treblinka to describe in excruciating detail what bestial acts he commited [sic] as Ivan the Terrible. Instead we will simply employ one or two witnesses (preferably non-Israelis) to testify that they saw him at Treblinka as a guard, the Trawniki card to prove that he was at Trawniki and Sobibor. Since we will have no way to account for what he did at Sobibor, we will focus on the fact that he was a guard and if he had disclosed it to either a displaced persons official or a vise [sic] consul he would have been

rejected without resort to further investigation. The positive factors are: (a) This approach focuses on what we believe to be true (that he was an extermination camp guard), and deletes that which we have reason to think untrue (that he was Ivan the Terrible who worked the gas chambers at Treblinka), and speaks to that which is legally sufficient (he lacked the good moral character to be an American citizen because he illegally entered the country, because he gave false testimony to the vice cousul as to his activities and if he had disclosed them, he would have been rejected. (b) It keeps us in the case against an individual we reasonably believe would not have been allowed to enter the country if he had disclosed the truth. The negative factors are: (a) so long as we cannot prove with clear and convincing evidence that he was at Sobibor, and do not believe the [sic] he was at Treblinka, option D is simply a ruse to avoid the ethical problems which beset option A, even if we do not identify him as Ivan the Terrible at Treblinka. (b) He disclosed to all officials that he was at Sobibor, and he was not required nor specifically asked what his activities were at Sobibor at the visa issuing stage. The pleadings at present state only that he failed to disclose to the vice consul his activities as a guard.

Opinion

To date, I have opposed arguments that we amend the pleadings to include references to Sobibor or Trawniki. Further, I had believed until recently that the Department would not seriously consider dismissal of the case in its present posture despite our gnawing doubts as to its veracity. I am now in favor of performing radical surgery on the approach we take in handling the case. I believe that we must decide no later than one week after Norman and John return from Europe what course we should take

and then take every step necessary and appropriate to implement that decision. My belief that a change is necessary is predicated on my assessment that Demjanjuk could not have been Ivan the Terrible at Treblinka as well as the Demjanjuk known to Danilchenko at Sobibor. A reading of the Canons of Ethics persuades me that I cannot pursue this case simply as a Treblinka matter on the premise that it is tactically shrewd and morally acceptable because we think he was a guard elsewhere.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-3435

JOHN DEMJANJUK, PETITIONER

v.

JOSEPH PETROVSKY, ET AL., RESPONDENTS

Report of the Special Master

Table of Contents

I. Introduction 1
A. Proceedings Before the Special Master .. 3
B. Witness Biographies 6
C. The Allegations 16
II. History of the Case 18
A. Aktion Reinhard 18
B. The Investigation in Israel 22
C. Founding of the Special Litigation Unit 26
D. Allegations of Improper Political Influence 27
E. The Fedorenko Protocols 38
F. The Polish Main Commission Information 49
G. German SS Officer and Survivor Witnesses 54
1. *Franz Suchomel* 56
2. *Kurt Franz* 59
3. *Survivor Witnesses* 62
4. *Otto Horn* 64
H. The Danilchenko Protocols 83
I. Assessment of the Evidence 89
1. *The Marchenko Evidence* 90
2. *The Sobibor Evidence* 99
J. The Dorofeev Protocols 118
K. Amending the Complaint 121
L. The Trial 124
M. The Mistrial Motion 125
N. The Judgment 132
O. The 1982 Polish Main Commission Dispute 133
P. Post-Judgment Motions 138
Q. The Deportation Proceedings 139

R. The Extradition Proceedings 141
S. The FOIA Litigation 153
III. The Discovery Requests 155
A. The Request for Production of Documents 155
B. The Interrogatories 168
1. The First Set 168
2. The Second Set 170
3. The Fourth Set 171
IV. Legal Standards 178
A. Discovery 178
1. Civil Rules 178
2. *Brady* 179
B. Fraud on the Court 182
C. The Allegations – Revisited 190
V. Conclusion 201
Recommendations 210
Appendix A-1

I. Introduction

Between July, 1942, and November, 1943, Nazi SS officers assisted by Ukrainian guards murdered between three quarters of a million and 900,000 Jewish men, women, and children at a death camp near the village of Treblinka, Poland.[1] Over thirty years later, in a courtroom in Cleveland, Ohio, five survivors and one German SS officer identified John Demjanjuk as a Ukrainian guard at Treblinka. Some of them identified Mr. Demjanjuk as "Ivan the Terrible," a notoriously savage guard who operated or serviced the diesel engines that fed exhaust gases into the chambers in which so many people died.[2]

Between 1976 and 1986, the United States Department of Justice prosecuted three separate cases against Mr. Demjanjuk, and obtained court orders denaturalizing him, deporting him, and extraditing him to Israel, where he stood trial and was sentenced to death for violating Israel's Nazi and Nazi Collaborator's (Punishment) Law.

While Mr. Demjanjuk's appeal to the Supreme Court of Israel was pending, Israeli prosecutors obtained information from the former Soviet Union inculpating a gas chamber motorist named Ivan Marchenko as "Ivan the Terrible," and, perforce, tending to exculpate Petitioner from those specific crimes. The merits of this evidence is still before the Supreme Court of Israel, which has not yet announced a decision.

---

[1] See Yitzhak Arad, *Belzec, Sobibor, Treblinka: The Operation Reinhard Death Camps* Appendix A (1987); Alexander Donat, ed., *The Death Camp Treblinka* 296-97 (1979) (reprinting excerpts from the German judgments in the 1965 and 1970 trials in Dusseldorf, Germany, of the SS officers who ran the Treblinka death camp).

[2] In order to provide the context in which the lawyers involved in the case against Petitioner viewed the evidence, the handling of which is at issue in this proceeding, I describe Treblinka's operations in more detail below. See Section II.A.

In the summer of 1992, the Sixth Circuit Court of Appeals reopened Mr. Demjanjuk's habeas corpus petition challenging his extradition. At oral argument before the Sixth Circuit Court of Appeals on August 11, 1992, Chief Judge Merritt stated the Court's concern about whether lawyers from the Department of Justice engaged in prosecutorial misconduct "by concealing or withholding from the district court and this court evidence in their possession that John Demjanjuk was not the notorious Ukrainian guard known as 'Ivan the Terrible' who operated the gas chambers at the Treblinka, Poland Nazi death camp."[3] On August 17, 1992, the Sixth Circuit Court of Appeals appointed me Special Master of that Court, to take the testimony of government lawyers and "to receive such other evidence as [I] may determine to be relevant and material to the issue under submission."[4]

A. Proceedings Before the Special Master

The ground rules for the proceedings before me were laid down at a preliminary meeting of the parties in Nashville, Tennessee, on September 4, 1992. I overruled a government motion to limit the scope of the inquiry, and, relying on my interpretation of the Sixth Circuit's Order referring the matter to me, I permitted both sides to seek discovery of all matters reasonably calculated to lead to the discovery of admissible evidence bearing on the ultimate questions at issue in the case. Included within this definition were the actions of the attorneys in all of the suits involving Mr. Demjanjuk.[5] Furthermore, I deemed it

---

[3] See Order, *Demjanjuk v. Petrovsky, et al.*, No. 85-3435 (6th Cir. Aug. 17, 1992).

[4] Id.

[5] See transcript of September 4, 1992 hearing, at 2-13.

best to conduct the proceedings in a customary, adversarial manner, rather than acting as an inquisitor myself.[6]

---

[6] Id.; see also Parker testimony, vol. I at 8 (prefatory discussion).

In a motion to the Sixth Circuit and in his Petition for a Writ of Prohibition or Mandamus before the Supreme Court, counsel for the witness Norman Moscowitz argued that it was improper for the Sixth Circuit to permit the original parties to the matter before that Court to litigate the question of fraud on the court before the Special Master. See *In re Moscowitz*, Petition for a Writ of Prohibition or Mandamus__ at 21-22, No. 92-1447 (filed March 2, 1993), denied, 61 U.S.L.W. ____ (May 25, 1993). Mr. Moscowitz cited *Universal Oil Products v. Root Refining Co.*, 328 U.S. 575 (1945), in which Justice Frankfurter stated:

> Accordingly, a federal court may bring before it by appropriate means all those who may be affected by the outcome of its investigation. But if the rights of parties are to be adjudicated in such an investigation, the usual safeguards of adversary proceedings must be observed. . . . Amici selected by the court to vindicate its honor ordinarily ought not be in the service of those having private interests in the outcome.

Id. at 580-81.

Root Refining is readily distinguishable from the present case, and in fact, I conclude that it supports the manner in which I conducted these proceedings. *Root Refining* involved a unique set of facts: the Plaintiff, Universal, had sued Root and another named firm for patent infringement. Universal brought similar suits against other firms at or about the same time. Universal won judgment against Root, and the judgment was affirmed on appeal by the Third Circuit. Subsequently, Root settled with Universal, and Universal attempted to use its litigation against Root as res judicata in its similar suits againt other companies (whom Universal alleged to have been in a "patent club" along with Root). Counsel for Root acquired evidence that one of the Court of Appeals judges who had affirmed Universal's judgment had done so because of bribery. Root, however, had no interest in seeing its settlement upset, and the other companies maintained that they were not parties to the original litigation. Root's counsel, therefore, offered themselves as (and were accepted as) amici to assist the Special Master in his investigation. The Master reported that the Court of Appeals' decision was tainted by fraud, and the amici

Over the course of the next six months, the parties (and attorneys for the witnesses) conducted extensive discovery of each others' files.[7] During the course of the proceed-

---

requested fees for their participation in the investigation. See id. at 576-80. Justice Frankfurter's opinion chastised the Court of Appeals for the participation of these attorneys as amici, and for the Master's disregard of the forms of adversarial practice. Id.

In these proceedings, however, each of the participants represents a real party in interest. Moreover, to the extent possible, I have preserved the rights of all persons, including witnesses, to bring relevant evidence to my attention. I have permitted attorneys for the witnesses to be present at all hearings, and to ask questions of witnesses (either directly, or through counsel for the Government). The sole exception, necessary in my opinion (and at the instigation of the counsel for both Mr. Demjanjuk and the Government), was to invoke the exclusionary rule with respect to witnesses.

With regard to Mr. Moscowitz's claim that counsel for Mr. Demjanjuk should not be permitted to act as a "prosecutor," I disagree with its premise and its logic. First, there is no doubt that counsel for Mr. Demjanjuk represents Mr. Demjanjuk's interests, which are directly implicated by the integrity of the decisions of the courts in his cases. Second, the analogy which Mr. Moscowitz draws between their role as advocates in these proceedings and that of a public prosecutor is an inapt one. Prosecutors are distinguished primarily by their obligation to seek justice, regardless of its effect on their client. A corollary of this obligation is their duty to refrain from prosecuting cases which lack merit. This Proceeding is mandated not by a prosecutor's decision to press charges, however, but by a supervising Court's decision to refer the matter to a Special Master. I have no choice but to investigate these matters.

Finally, it was clear in the fall of 1992, and is even more clear today (after several thousand pages of testimony and the introduction of over three hundred documentary exhibits) that the original parties to this litigation were in the best position to sift through the mounds of evidence (which I am certain exceeds that which was actually introduced) for the most relevant and probative documents and questions.

[7] I am happy to report that in this case – which raises so many questions about the use of discovery procedures – all sides behaved commendably during discovery. Acting on an accelerated timetable, the

ings, the parties and witnesses introduced over three hundred exhibits. I heard the testimony of six witnesses in hearings conducted in various locations between November, 1992, and February, 1993. In addition, the parties have submitted several depositions of witnesses of lesser significance which I have considered in writing the following Report, which takes a narrative form, rather than one composed of specific findings of fact.

B. Witness Biographies

I have received the testimony, either in person or through depositions, of the following persons:[8]

Gerard F. Charig

The parties took the deposition of Gerard F. Charig in Washington, D.C., on October 28, 1992. Mr. Charig, who is now retired, was a senior trial attorney with the Department of Justice, and was stationed in Munich, Germany, at the American Consulate. He was involved with the Demjanjuk litigation briefly from the late summer of 1979, when Norman Moscowitz first contacted him, until

---

lawyers produced and reviewed great quantities of documents. The disputes which they could not resolve themselves and had to bring to my attention were quite few.

I am also impressed with the cooperation shown by the Department of Justice. Over the course of the proceedings, the Department showed an obvious desire to permit me to get to the bottom of the allegations in this case, and produced many documents which would have been otherwise protected from disclosure by either the attorney/client privilege or the work product doctrine. The handful of documents which they did not produce to Mr. Demjanjuk, they produced to me for in camera inspection.

[8] In addition to those listed, the parties also deposed Jaroslaw Dobrowolskyj, Jerome Brentar, and David Springer (Mr. Springer was deposed upon written questions).

sometime in 1980. Mr. Charig assisted the OSI lawyers in locating and interviewing several German witnesses, and in obtaining records of German Nazi criminal trials.[9]

Kathleen N. Coleman

Kathleen Coleman was an attorney with the OSI between August, 1979, and June, 1984. She was a colleague of George Parker, and was deposed on Februry 12, 1993, in Washington, D.C., about his assertions that he had solicited her advice when he became troubled about discrepancies he saw in the evidence in the Demjanjuk case. Ms. Coleman is still an attorney with the Department of Justice, but now works in the Office of Enforcement Operations of the Criminal Division.[10]

Donald A. Couvillon

Donald Couvillon, deposed on December 18, 1992, in Washington, D.C., is presently an attorney with the Office of Immigration Litigation in the Civil Division of the Department of Justice. Between March 30, 1978, and May 5, 1979, Mr. Couvillon worked in the SLU. He was assigned to work on the *Fedorenko* trial, which took place in Miami, Florida, in the early summer of 1978. While working on *Fedorenko,* Mr. Couvillon became familiar with many of the witnesses who were to testify against Mr. Demjanjuk, and Mr. Couvillon was assigned, along with Eugene Thirolf, to work on the Demjanjuk case. After Martin Mendelsohn took control of the case in November, 1978, Mr. Couvillon worked on the case sporadically, and only as directed.[11]

---

[9] See Charig deposition at 8-17, 27-30, 40-43, 46-47.

[10] See Coleman deposition at 4-8.

[11] See Couvillon deposition at 7-11, 13-13, 64-65, 93; Mendelsohn testimony at 78-79.

Bernard J. Dougherty

Bernard Dougherty is a Special Agent with the Diplomatic Security Service of the Department of State. Between October, 1979, and December, 1980, Mr. Dougherty was detailed to the OSI where he worked as a Criminal Investigator. Along with George Garand, Mr. Dougherty conducted the initial photographic identification interview of Otto Horn, a former German SS officer at Treblinka. The parties took Mr. Dougherty's deposition in Washington, D.C., on December 22, 1992.[12]

Judge Bruce J. Einhorn

Judge Bruce J. Einhorn, presently a United States Immigration Judge in Los Angeles, California, worked as an attorney with the OSI between October 2, 1979, and June, 1990. On August 4, 1980, Neal Sher, who was at the time Deputy Director of the OSI,[13] assigned Judge Einhorn to work on the Demjanjuk case. Although Judge Einhorn entered an appearance in the denaturalization case in October, 1980, he did not particpate in discovery, and remained as a standby attorney until Judge Battisti's decision in the denaturalization trial. Following the decision, Judge Einhorn represented the government in its opposition to Mr. Demjanjuk's motions to reopen the denaturalization case, filed in 1983 and 1984. Judge Einhorn's role in the deportation and extradition proceedings was similarly substantial: he was the lead attorney in the deportation case against Mr. Demjanjuk, and assisted the Office of International Affairs in the

---

[12] See Dougherty deposition at 5-13; Moscowitz testimony at 75.

[13] Mr. Sher is presently the OSI's Director. See below.

extradition case. Judge Einhorn testified before the Special Master on February 5, 1993, in Los Angeles, California.[14]

John Horrigan

John Horrigan, along with Norman Moscowitz, tried the denaturalization case before Judge Battisti. United States Attorney James R. Williams assigned Mr. Horrigan to the Demjanjuk case in June or July of 1978, and Mr. Horrigan participated extensively in discovery, pretrial preparation, and the trial, which began in February of 1981. Mr. Horrigan is presently an attorney in private practice in Cleveland, Ohio, and testified before the Special Master on January 15, 1993, in Nashville, Tennessee.[15]

George Garand

Between April 13, 1979, and April, 1989, George Garand worked in the OSI as an historian. Along with Bernard Dougherty, Mr. Garand, who is fluent in the German language, conducted the initial photographic identification interview with Otto Horn, a German participant at Treblinka. The parties took Mr. Garand's deposition on December 22, 1992, in Washington, D.C.[16]

---

[14] See Einhorn testimony at 4-8, 17, 70, 79, 81; Moscowitz testimony at 251; Sher deposition at 44-47. For Mr. Sher's assignment of Judge Einhorn, see Pet. Exh. 178 (by agreement, Judge Einhorn never wrote the status memorandum Mr. Sher's memorandum called for; see Einhorn testimony at 4-8; Sher deposition at 44-47). For Judge Einhorn's appearance in the denaturalization case, see Pet. Exh. 181 (letter from Judge Einhorn to George Meshel, Clerk, U.S. District Court for the N.D. Ohio).

[15] See Horrigan testimony at 289-290.

[16] See Garand testimony at 5-8; Moscowitz testimony at 74-75.

Martin Mendelsohn

Martin Mendelsohn was the Director of the SLU, the OSI's predecessor, from its founding in the fall of 1977 until the OSI's creation in mid-1979, when he acquired the title of Deputy Director of Litigation. In November, 1978, Associate Attorney General Michael J. Egan appointed Mr. Mendelsohn as lead attorney in the Demjanjuk denaturalization case. Upon the OSI's creation, however, Walter Rockler, the Office's first Director, believed that Mr. Mendelsohn was withholding materials from him, and had Mr. Mendelsohn transferred out of the OSI. While he was Director of the SLU, Mr. Mendelsohn hired George Parker, who had worked under him in a legal services program in East Saint Louis, Illinois. Mr. Mendelsohn is presently an attorney in private practice in Washington, D.C., and testified before the Special Master on November 13, 1992, in Nashville, Tennessee.[17]

Norman Moscowitz

Norman Moscowitz, presently an Assistant United States Attorney in Miami, Florida, worked as an attorney with the OSI from July, 1979, until October, 1982. Mr. Moscowitz, along with Mr. Horrigan, participated extensively in the discovery, pretrial preparation, and trial of the denaturalization case against Mr. Demjanjuk. Mr. Moscowitz did not participate in any substantial way in the deportation and extradition cases against Mr. Demjanjuk, both of which took place after he left the OSI. Mr.

---

[17] See Mendelsohn testimony at 76-78, 109-110, 140-141, 143; Parker testimony, vol. I at 16-17, 104, 144; Rockler deposition at 20-21. For a description of the events leading to Mr. Mendelsohn's appointment as lead attorney in the Demjanjuk case, see section II.D., below.

Moscowitz testified before the Special Master on January 14 and 15, 1993, in Nashville, Tennessee.[18]

George Parker

George Parker, who testified before the Special Master in Nashville, Tennessee, on November 12 and 13, 1992, worked in the SLU (later OSI) from the spring of 1978 until mid-June, 1980. He was first assigned to work on the Demjanjuk case in June of 1979, initially as an assistant to Martin Mendelsohn, and subsequently as a colleague of Norman Moscowitz and John Horrigan. Mr. Parker is currently an attorney in private practice in Rochester, New York.[19]

Walter Rockler

Walter Rockler is a former Nuremburg prosecutor who was the first Director of the OSI upon its formation in summer of 1979. While Director, Mr. Rockler served with the Department of Justice on a contract basis, and split his time between the OSI and his private practice, which he still maintains, in Washington, D.C. The Department hired Mr. Rockler with the understanding that he would serve temporarily, and he left in April, 1980, when his successor, Allan Ryan, Jr., (who had succeeded Martin Mendelsohn as Deputy Director of Litigation) was named Director of the OSI. Messrs. Ryan and Rockler travelled together to Moscow in January, 1980, where they met with officials of the then-Soviet Union and discussed the

---

[18] See Moscowitz testimony at 7-10, 150-151, 199; Parker testimony, vol. I at 15-17.

[19] See Parker testimony, vol. I at 13-14, 16, 144-45, and 197; vol. II at 25; Mendelsohn testimony at 139-140, and 143; Moscowitz testimony at 10.

assistance which that country could provide the OSI in prosecuting its cases. The parties took Mr. Rockler's deposition in Washington, D.C., on December 15, 1992.[20]

Allan A. Ryan, Jr.

Allan A. Ryan, Jr., who is currently University Counsel to Harvard University, and a lecturer at the Boston College Law School, testified before the Special Master in Boston, Massachusetts, on January 29, 1993. Mr. Ryan worked on the *Fedorenko* appeal while in the Solicitor General's Office, and that case gave birth to his interest in prosecuting suspected war criminals. He spoke with Walter Rockler about working for the OSI, and came to that Office as Deputy Director of Litigation in January, 1980, replacing Martin Mendelsohn. Upon Mr. Rockler's return to private practice a few months later, Mr. Ryan became Director of the OSI. Mr. Ryan effectively left the OSI in March, 1983, when he was detailed to the Assistant Attorney General's office to investigate the case of Klaus Barbie. He left the Department of Justice altogether in August, 1983, upon the release of his report in the Barbie case.[21]

Neal Sher

Neal Sher is the current Director of the OSI. He began working for the OSI as a trial attorney in the summer of 1979, and became Deputy Director of Litigation when Allen Ryan became Director upon Walter Rockler's depar-

---

[20] See Rockler deposition at 6-11, 13-14, 17-20, 49-50, 56-58; Parker testimony, vol. I at 14-15; Mendelsohn testimony at 109, 141; Moscowitz testimony at 146, 252.

[21] See Ryan testimony at 18-19, 99-100, 103-105, 113; Parker testimony at 93-94; Rockler deposition at 14-16; Sher deposition at 100-101.

ture. When Allan Ryan left the OSI to serve as Special Assistant to the Assistant Attorney General in March, 1983, Mr. Sher became Acting Director; he was confirmed as Director in the fall of that same year. The parties deposed Mr. Sher in Cleveland, Ohio, on February 19, 1993.[22]

Arthur Sinai

Upon the formation of the OSI in the summer of 1979, it hired Arthur Sinai as Deputy Director of Investigations, to set up an investigative staff, and to open lines of communication to domestic and foreign investigative agencies. Mr. Sinai had no direct involvement in the Demjanjuk case, but supervised investigators and historians. He left the OSI in the early summer of 1980, and is currently a consultant in New York, New York. The parties deposed him in Washington, D.C., on February 12, 1993.[23]

C. The Allegations

Mr. Demjanjuk argues that the government committed fraud on the Court by failing to disclose several pieces of evidence, which may be roughly categorized as follows:

1. The Fedorenko (1978) Protocols.

   These are statements from the Soviet Union of several former guards at Treblinka, including two—those of Pavel Leleko and Nikolai Malagon—which discuss the presence of a man named Marchenko at the gas chambers. The Soviet Union provided the statements to the Department of Justice in 1978 in connection with the case of Feodor Fedorenko.

---

[22] See Sher deposition at 7-10, 61.

[23] See Sinai deposition at 4-12, 55; Parker testimony, vol. I at 15; Mendelsohn testimony at 109; Moscowitz testimony at 253.

Accompanying the Protocols was a copy of a list of guards transferred out of the Trawniki, Poland, training camp, on which Mr. Demjanjuk's name was not listed.

2. The Danilchenko (1979) Protocols.

These are statements – similar to the Fedorenko Protocols – which also came from the Soviet Union. They include a second interview of Nikolai Malagon, and an interview of Ignat Danilchenko, who had identified Mr. Demjanjuk as a guard at the Sobibor camp. The Soviet Union provided the statements to the Department of Justice in 1979, pursuant to the Demjanjuk prosecutors' request.

3. The Dorofeev (1980) Protocols.

These are a third set of statements received from the Soviet Union in 1981, and include a statement from Nickolay Dorofeev. The government prosecutors produced these statements to Mr. Demjanjuk between the end of the trial and Judge Battisti's decision in the denaturalization case.

4. "Polish Main Commission" List

This is an article on the Treblinka camps, written by Stanislaw Wojtczak, and published in Poland in the Bulletin of the Main Commission for the Investigation of Hitlerite Crimes in Poland, which contains a partial list of the names of guards known to have worked at the Treblinka death camp. The Commission provided the article to the government in 1979.

5. Sol Lackman

OSI investigators interviewed Mr. Lackman, a Jewish survivor of Treblinka, in 1980. Mr.

Lackman was unable to identify Mr. Demjanjuk as the guard he knew by the name "Ivan Grozny."

6. Otto Horn Interview Memoranda

In 1979, OSI investigators and attorneys interviewed Otto Horn, another Nazi SS guard at Treblinka, and asked him to identify Mr. Demjanjuk in two photospreads. The two investigators who conducted the photospread wrote in contemporaneous memoranda that Mr. Horn identified Mr. Demjanjuk only after observing that Mr. Demjanjuk was pictured in both photospreads the investigators showed to him. Subsequently, Mr. Horn testified that the picture was not visible to him when he made the identification.

In addition, Mr. Demjanjuk argues that the government, despite its knowledge of this and other exculpatory evidence,[24] prosecuted him in response to pressure which Members of Congress, the State of Israel, and Jewish influence groups brought to bear on the Department of Justice.

To address these allegations, I will first make factual findings with respect to the process of investigating the Demjanjuk case and acquiring the pieces of evidence which are in dispute. I will discuss the government attorneys' interpretation of this evidence as it fits into the narrative. I will then turn to the specific discovery requests which Mr. Demjanjuk made of the government. After describing the relevant standards of disclosure, I will conclude by determining whether the government met its

---

[24] Including, for example, Franz Suchomel's failure to identify Mr. Demjanjuk. Mr. Suchomel was convicted of being a Nazi SS guard at Treblinka.

obligations to Mr. Demjanjuk, and whether their actions amounted to fraud on the court or prosecutorial misconduct.

II. History of the Case

A. Aktion Reinhard

The areas of Poland occupied by German military forces in 1941-42 were governed under the "General Government," which comprised districts which included the large cities of Poland, and a pre-occupation Jewish population of over two million people.[25] At the "Wannsee Conference" in January, 1942, which inaugurated the "final solution," the Director-General of the General Government demanded that the Nazi government apply this program of annihilation first in Poland.[26] Following the assassination of Oberfuhrer Reinhard Heydrich—the original architect of the "final solution"—in Prague in May, 1942, the policy of murdering the Jewish people of Poland was named Aktion Reinhard in his honor.

Many of the original participants in Aktion Reinhard had worked in the German T4 euthanasia program[27] and were transferred to Poland following that program's termination. As Judge Battisti described in his opinion in the denaturalization case against Mr. Demjanjuk:

> Three extermination camps were constructed to implement the mass annihilation conceived by Aktion

---

[25] See Yitzhak Arad, *Belzec, Sobibor, Treblinka: The Operation Reinhard Death Camps* 12-13 (1987).

[26] Id.

[27] T4 was named for the program's secret headquarters at Tiergartenstrasse 4 in Berlin. See generally Sereny, *Into That Darkness* 48-90 (1974).

> Reinhard. Two camps, Belzec and Sobibor, were located in the Lublin district of Poland, southeast of Warsaw. The third camp, Treblinka, was located in the district of Warsaw. . . .
>
> The German SS lacked sufficient manpower in the Lublin district to carry out all the "tasks" of Aktion Reinhard. Consequently, Russian [(and Ukrainian)] POWs were employed in rounding up and transporting the Jews from the ghettoes to which they had been confined and also as staff in the concentration camps themselves.[28]

(Citations omitted).

The Treblinka death camp[29] was divided into two parts. Camp 2 (or the "upper" camp) contained the machinery for killing the victims and disposing of their bodies: the gas chambers, outdoor crematoria, and burial pits. In addition, there were barracks for the Jewish prisoners forced to perform virtually all of the manual labor necessary for the killing operations. Camp 1 (or the "lower" camp) contained a separate area for housing the German and Ukrainian staff and guards, a fenced-off area housing Camp 1's contingent of Jewish prisoners, and a "reception area" at which the unfortunate arrivals were stripped of their valuables and made ready to be fed into the killing machine of Camp 2. The two camps were within a common fence, and were connected by the Himmelstrasse, or "road to heaven," which was an enclosed path leading to the gas chambers.[30] There was little communication be-

---

[28] See *United States v. Demjanjuk*, 518 F.Supp. 1362, 1364-64 (N.D.Ohio 1981).

[29] There also was a Treblinka labor camp, located a few kilometers from the death camp.

[30] See generally Arad at 37-43.

tween the two contingents of Jewish prisoners, but because the barracks for Camp 1's laborers were located between Camp 2 and the staff barracks, the Germans and Ukrainians who worked in Camp 2 passed by or through Camp 1 on their way to and from their positions.

The camp began to receive and kill transports of people in July, 1942, and continued, with varying intensity, for more than a year. On August 2, 1943, Jewish prisoners in Camp 1 executed a revolt which they had carefully plotted. The prisoners had secretly obtained hand grenades from the German arsenal, and took advantage of the Ukrainian guards' absence—they had gone swimming nearby in the river Bug with Deputy Commandant Kurt Franz—to make their escape. They set fire to the camp, and escaped into the adjoining woods. Most of the escapees were recaptured and shot, but some managed to evade capture. The camp was not rebuilt in its original form, but because the inmates had been unable to adequately destroy the gas chambers, the Germans were able to resume operations at the camp on a limited basis. In November, 1943 the camp was completely razed, the ground leveled, and a farmhouse built on the site. The few remaining Jewish prisoners were killed and buried on the grounds. A Ukrainian guard was assigned to stay at the house, and tell the Soviet army—whose arrival had become inevitable at that point—that he had been there for years.[31]

B. The Investigation in Israel

In 1976, the Immigration and Naturalization Service (INS) of the Department of Justice began an investigation

---

[31] See generally Alexander Donat, ed., *The Death Camp Treblinka* at 315-16 (reprinting excerpts from the trial of Deputy Commandant Franz and nine others at Dusseldorf, Germany—the "First Treblinka Trial"—in 1965.)

of John Demjanjuk following receipt of information that he had served as a guard at the Nazi death camp in Sobibor, Poland.[32] At the same time, the INS was investigating allegations that Feodor Fedorenko had served as a guard at the Treblinka death camp in Poland. The INS sent photographs of Demjanjuk, Fedorenko, and fifteen other Ukrainians suspected of war crimes to Israel. Israeli officials placed the photographs in an album. Mr. Demjanjuk's visa photograph, No. 16 in the album, was placed on the third page along with seven other photographs, including Fedorenko's.[33]

On May 9, 1976, Israeli investigator Miriam Radiwker showed the album to Treblinka survivor Abraham Goldfarb to see if he could identify Fedorenko's photograph. To the investigator's surprise, Mr. Goldfarb, who had worked in Camp 2, "right at the gas chambers," pointed to Mr. Demjanjuk's photograph and identified him as "Ivan" who "together with a German SS man * * * released gas from the Diesel motor into the gas chambers" and who also "stuff[ed] people into the gas chambers." When the investigator challenged Goldfarb and told him that the man in photograph No. 16 was alleged to have been at Sobibor, Mr. Goldfarb insisted that "during 1942/43 he had to be in Treblinka, but before the uprising in the summer of 1943, he was no longer, I believe, in Treblinka."[34]

---

[32] See Resp. App. 5-7 (Report of Investigation).

[33] See Resp. Exh. 43 (photospread).

[34] Resp. Exh. 45. Resp. Exh. 45 consists of the statements and reports of investigation of 17 of the 18 identifying witnesses. There is no statement or report for Chil Rajchman, the 18th identifier. Rajchman's identification of petitioner was disclosed in an interrogatory response and further developed in Rajchman's testimony at petitioner's denaturalization trial. See Pet. Exh. 198 at 1370 (district court denaturalization decision).

The following day, the investigator interviewed Eugene Turowski, who had worked in the repair shop in Camp 1 at Treblinka, but who did not have access to Camp 2, where the gas chambers were located. He selected Mr. Demjanjuk's photograph "at first glance," explaining, "I knew him personally, because at times he came to the shop to have things repaired." Mr. Turowski, the only survivor to recognize Mr. Demjanjuk's last name, noted that Mr. Demjanjuk was "still a very young man, could have been 23-24 at the most" when he served at Treblinka, although even at that early age he already had "a bald pate starting."[35]

Elijahu Rosenberg had carried corpses from the gas chambers to the burial pits in Camp 2 of Treblinka. Following his escape, Mr. Rosenberg had said that Ivan had been killed in the prisoner revolt at Treblinka on August 2, 1943. He later testified that he had merely heard this as a rumor, and had repeated it because he wanted to believe it to be true.[36] When Radiwker showed Mr. Rosenberg the photo album on May 11, 1976, he cautiously stated that Mr. Demjanjuk's photograph, No. 16, bore a "great resemblance" to the Ivan at the gas chambers. Ivan, he recalled, had the same "round full face," the "beginning of baldness" and "his ears were standing away from his face." Rosenberg declined to identify petitioner's photograph with "(absolute) certainty," however. He told Ms. Radiwker that Ivan "was very young, maybe 22-23 years old." (Mr. Demjanjuk's visa photo depicted an older man.) When Ms. Radiwker told Mr. Rosenberg that Mr. Demjanjuk had been at Sobibor, not Treblinka, Mr. Rosenberg said that some skilled inmates and some Ukrainian guards had been transferred to Sobibor during 1942,

---

[35] Resp. Exh. 45.

[36] Resp. App. 551-552.

but that he saw Ivan at Treblinka until the uprising.[37]

In September 1976, Ms. Radiwker showed the 17 photographs to additional survivors. Josef Czarny, who had worked in Camp 1, identified Demjanjuk's photograph as a guard known as "Ivan Grozny" "at first glance with complete certainty." When told that petitioner was "not in Treblinka, but in Sobibor," Czarny declared, "This is not so." Czarny also informed the investigator that he was only 16 when he was imprisoned at Treblinka, and that Ivan was at most four or five years older.[38]

Gustaw Boraks, who worked in both camps while at Treblinka, identified Demjanjuk's photograph with "one hundred percent of certainty." Abraham Lindwasser also made a positive identification, although he remarked that Mr. Demjanjuk's visa photograph must have been taken later because Ivan was only "21-22-23 years old" at Treblinka. Mr. Lindwasser worked as a "dentist" near the gas chambers, removing valuable dental work from the mouths of the corpses. According to Mr. Lindwasser, Ivan "serviced the big diesel engine."[39]

In October, 1976, the Israeli authorities sent the INS the statements of the six Treblinka survivors who identified Mr. Demjanjuk's photograph and a statement from a seventh survivor, Schlomo Helman, who had not done so.[40]

On August 25, 1977, the United States Attorney for the Northern District of Ohio brought an action to revoke Mr. Demjanjuk's certificate of naturalization. The denaturali-

---

[37] Resp. Exh. 45.

[38] Id.

[39] Id.

[40] Pet. Exh. 94. (letter from Israeli police officials to the INS New York District Director).

zation complaint alleged that Mr. Demjanjuk had served with the German SS at the Nazi death camp in Treblinka, Poland, and that Mr. Demjanjuk had concealed and misrepresented his SS service both when he applied for an immigration visa in 1952 and when he applied for naturalization in 1958.[41]

C. Founding of the Special Litigation Unit (SLU)

During the summer of 1976, when the Israeli investigators were interviewing survivors of the death camp, a political storm began to brew over the United States' handling of cases of alleged Nazi war crimes. Representatives Joshua Eilberg of Philadelphia and Elizabeth Holtzman of Brooklyn, suspicious that government inaction in the past may have been the result of a conspiracy, ordered the General Accounting Office to investigate the Department of Justice's handling of such cases,[42] and wrote letters to Attorney General Edward Levi.[43]

In August of 1977, at the same time the United States Attorney in Cleveland prepared to file the Complaint against Mr. Demjanjuk, the Department of Justice created the "special litigation unit," (the "SLU') to prosecute war crimes cases. Martin Mendelsohn was appointed to head up the SLU.

---

[41] Pet. Exh. 1.

[42] The GAO found no evidence of such a conspiracy. See *Widespread Conspiracy to Obstruct Probes of Alleged Nazi War Criminals Not Supported By Available Evidence—Controversy May Continue,* Report by the Comptroller of the U.S., May 15, 1978, reprinted in *Alleged Nazi War Criminals*, Hearings before the Subcommittee on Immigration, Citizenship, and International Law of the Committee of the Judiciary of the House of Representatives, 95th Cong., 1st Sess. (Ser. No. 95-93).

[43] Ryan, *Quiet Neighbors* at 58.

D. Allegations of Improper Political Influence

The creation of the SLU was catalyzed by politics. Political pressures from Members of Congress, the State of Israel, Jewish organizations, and the public played a significant role in the creation of the Office of Special Investigations, too, and in the definition of the Office's role in litigation against suspected war criminals. Nevertheless, there is no substantial evidence that these pressures played any role in the decisions whether, and how, to prosecute Mr. Demjanjuk.

Political pressures also played a significant, though indirect role in the handling of the Demjanjuk litigation. These political pressures, along with personality clashes amongst members of the prosecution team, caused turbulence during a critical period of the Department of Justice's investigation into the actions of Ivan the Terrible, and of Mr. Demjanjuk's alleged service in *Aktion Reinhard.* Nevertheless, the record does not support the conclusion that political pressures from members of Congress, the State of Israel, or Jewish groups in the United States influenced any government lawyer in litigation decisions regarding the Demjanjuk case.

The evidence of political pressure can be placed in three categories: first, there is evidence relating to a "turf battle" between the SLU and the U.S. Attorney's office in Cleveland; second, there is George Parker's reference to political considerations in a February 28, 1980, memorandum; finally, there is former OSI Director Allan Ryan's reference to increased ties with Jewish groups as an accomplishment in a management review memorandum.

The Turf Battle

In 1978, the government tried the case of Feodor Fedorenko—the person whose photograph had accomp-

anied Mr. Demjanjuk's in the photospreads in Israel. The trial went badly, and the Israeli witnesses felt that they had been poorly treated. Following the *Fedorenko* trial, the SLU lawyers turned their attentions to Mr. Demjanjuk's case. The SLU found that the United States Attorney's office in Cleveland was a reluctant partner, however, and a protracted "turf battle" began. In June, 1978, Donald Couvillon, an attorney with the SLU, wrote his superior, Martin Mendelsohn, accusing the U.S. Attorney's Office of mishandling the case, and of acting in bad faith.[44] Mr. Couvillon believed that the U.S. Attorney's continued control over the Demjanjuk case was contrary to the SLU's mandate, and quoted INS General Counsel David L. Crosland's testimony before Congress for the proposition that the SLU should try cases of this type.

Following the decision against them in *Fedorenko,* SLU lawyers became eager to avoid repeating the mistakes made in Florida.[45] Mr. Couvillon expressed his concerns directly to Mr. Crosland in a memorandum written on July 28, 1978.[46]

At the same time, pressure began to mount on the SLU from another source: in early August, 1978, Mr. Mendelsohn met with Israeli officials who were unhappy with the treatment their nationals had received while

---

[44] See Pet. Exh. 37 (memorandum from Couvillon to Mendelsohn, dated June 30, 1978).

[45] The Fifth Circuit eventually reversed Judge Roettger's decision in *United States v. Fedorenko*, 455 F.Supp. 893 (S.D.Fla. 1978), 597 F.2d 946 (1979) and ordered Fedorenko to be stripped of his citizenship. The Supreme Court affirmed. 449 U.S. 490 (1981).

[46] See Pet. Exh. 100 (memorandum from Couvillon to Crosland, dated July 28, 1978).

testifying in the *Fedorenko* case.[47] Many of the witnesses expected to be called in Mr. Demjanjuk's trial had testified in the *Fedorenko* trial, and were unwilling to return to the United States following their earlier experience. These concerns led an Israeli official to request formally that the SLU be placed in charge of the case, in letters he wrote to Martin Mendelsohn and Congressman Joshua Eilberg.[48] Eventually the SLU lawyers promised the Israeli officials and witnesses that their office would control the Demjanjuk case, and would present them to the Court.[49]

Mr. Mendelsohn and U.S. Attorney James R. Williams reached an agreement to cooperate in the case in early September, 1978, with each side designating two attorneys to work on the case.[50] Despite this apparent agreement, the SLU and the United States Attorney's office remained far apart in their understanding of the locus of control over the Demjanjuk case. The United States Attorney asserted in a letter to the INS General Counsel that his attorneys remained in control of the case, with the assistance

---

[47] See Pet. Exh. 103 (cable from Mendelsohn, dated August 8, 1978).

[48] See Pet. Exh. 106 (letter from Chief Superintendent Menachem Russek of the Israeli police to Martin Mendelsohn); Pet. Exh. 107 (letter from Chief Superintendent Russek to Cong. Eilberg); Pet. Exh. 108. Congressman Eilberg, in turn, wrote a letter to Attorney General Griffin Bell expressing his concern over the handling of the Demjanjuk case. See Pet. Exh. 108, reprinted in Alleged Nazi War Criminals: Hearings Before the Subcommittee on Immigration, Citizenship, and International Law of the Committee on the Judiciary of the House of Representatives, at Appendix S, 95th Cong., 1st Sess. (1978).

[49] See Pet. Exh. 113 (memorandum to the Demjanjuk file from Martin Mendelsohn dated October 25, 1978); Couvillon deposition at 44-46.

[50] See Pet. Exh. 65. The SLU attorneys were to be Donald Couvillon and Eugene Thirolf. The United States Attorney was to be represented by John Horrigan and Pat McLaughlin. Id.

of the SLU lawyers. Martin Mendelsohn, as the SLU's Director, struggled to formulate a response.[51] Reflecting this misunderstanding, the two staffs continued to encounter problems working together: the SLU staff complained that Mr. Horrigan refused to provide them with a copy of Mr. Demjanjuk's "A file";[52] they complained that the Assistant United States Attorneys were not performing the tasks assigned to them under the agreement,[53] and that they were unavailable for meetings.[54] In turn, the Assistant United States Attorneys disagreed with the SLU lawyers' tactical proposals and resented the SLU's commitment to present the Israeli witnesses.[55]

In late October, 1978, Martin Mendelsohn switched tactics, and began to lobby INS General Counsel Crosland for control of the case.[56] Mr. Mendelsohn described the Demjanjuk case as "critical" for five reasons:

---

[51] See Pet. Exh. 113 (letter from U.S. Attorney Williams to INS General Counsel Crosland, dated September 20, 1978); Pet. Exh. 113 (memorandum from Martin Mendelsohn to INS General Counsel Crosland, dated September 26, 1978).

[52] An "A file" is a file kept by the immigration service on each alien. See Couvillon deposition at 82. With regard to the dispute over the file, see Pet. Exh. 113 (memorandum from Harold Jacobs to Donald Couvillon); Pet. Exh. 113 (memorandum from Martin Mendelsohn to David Crosland, dated September 26, 1978).

[53] See Pet. Exh. 113 (memo from Thirolf to Mendelsohn, dated October 23, 1978).

[54] Id.

[55] See Pet. Exh. 113 (memo from Donald Couvillon to Martin Mendelsohn dated October 26, 1978); Pet. Exh. 113 (memorandum to the Demjanjuk file from Martin Mendelsohn dated October 25, 1978).

[56] See Pet. Exh. 65 (memorandum from Martin Mendelsohn to INS General Counsel Crosland dated October 25, 1978). This document is reprinted in Petitioner's Supplemental Appendix at 183, submitted to the Sixth Circuit on August 3, 1992.

1. It should not be lost;
2. It has witnesses who were used in *Fedorenko*;
3. It has languished in the U.S. Attorney's office for more than a year;
4. The Special Litigation Unit, regardless of the degree of its involvement, has been, is, and will be blamed for any shortcomings in the presentation of the evidence and the result in this case;
5. Our future relationship with other U.S. Attorneys is dependent upon how this issue is resolved.[57]

In November, 1978, Associate Attorney General Michael J. Egan intervened, settled the turf battle in favor of the SLU, and named Martin Mendelsohn as lead counsel in the Demjanjuk case.[58]

Viewed in the historical context I have just described, Mr. Mendelsohn's October 25, 1978, memorandum is clearly not the product of a "win at all costs" attitude directed against Mr. Demjanjuk. Rather, the danger Mr. Mendelsohn perceived to face the SLU was its colleagues at the U.S. Attorney's Office in Cleveland. As Mr. Mendelsohn credibly testified concerning his motivation:

> I felt myself being hung out to dry, so to speak, being responsible for a case, but not knowing what was in the file or the facts that led to the filing of the complaint.[59]

This statement echoes his fourth enumerated reason why the Demjanjuk case was critical to the SLU.

The effects of the political pressure—which was primarily confined to this time period—appear to be limited to

---

[57] Id.

[58] See Pet. Exh. 114 (copies of letters to U.S. Attorney Williams from Associate Attorney General Egan, dated November 16, 1978).

[59] See Mendelsohn testimony at 88.

the resolution of this territorial dispute. There is no evidence in the record that political considerations affected any tactical litigation decision; indeed, the dispute in the fall and summer of 1978 was so disabling to the prosecution,[60] that little or nothing was accomplished.[61]

George Parker's Memorandum

George Parker was aware of the political pressures which had been placed on OSI as the SLU's successor, but this knowledge does not appear to have motivated him tactically. Mr. Parker believed that the Treblinka evidence could not be reconciled with evidence placing Mr. Demjanjuk at the Sobibor, Poland, death camp. In a February 28, 1980 memorandum,[62] Mr. Parker described four options available to the OSI in light of his doubts that Mr. Demjanjuk was Ivan the Terrible of Treblinka. Mr. Parker viewed option "C" (to "Dismiss the Case – At Least Temporarily") as undesirable in part because of "negative factors [which] are largely political and obviously considerable."[63] Mr. Parker clarified this statement in his testimony, stating that Mr. Demjanjuk's case was significant because of the horrific nature of Ivan the Terrible's crimes at Treblinka. He stated that because the Department had "not done very well" in cases dependent solely upon eyewitness testimony, it was important that Mr. Demjanjuk's case be handled capably.[64]

---

[60] Mr. Couvilon testified that "turf battle" is a "benign" characterization of the dispute. See Couvillon deposition at 43.

[61] See id. at 23.

[62] Pet. Exh. 72. I discuss this memo in greater detail below. See section II.1.2.b.

[63] Id. at the fifth page.

[64] Parker testimony, vol. I at 70-73.

As Mr. Parker testified, there is a difference between pressure to win a case at all costs, and pressure to handle a meritorious case responsibly.[65] Read in light of this explanation, the above-quoted language from his memorandum does not possess a sinister character. Certainly, Mr. Parker's choice of language was unfortunate; prosecutors should attempt, as much as possible, to avoid the appearance that political considerations play a role in their decisionmaking. Nevertheless, Mr. Parker's reference to political considerations was intended to have the salutary effect of impressing on his colleagues the need to proceed against Mr. Demjanjuk with caution:

> Q. That is what I am asking you, sir. It was important to your group, Special Litigation Unit, OSI at that time to win the Demjanjuk case, correct?
>
> A. No. It was important to not have a Walus case.[66] It was not important to win the Demjanjuk case as then pled at all costs, no. That was not what was most important.[67]

---

[65] Id. at 73.

[66] In *United States v. Walus* 453 F.Supp. 699 (N.D.Ill. 1978), vacated and remanded, 616 F.2d 283 (7th Cir. 1980), the OSI filed a denaturalization complaint against a Mr. Walus, a Polish emigré. At trial, several people from the Jewish ghettoes of Kiecle and Czestochowa, Poland, testified that Mr. Walus had been a member of the German Gestapo and had persecuted Jews. After the Seventh Circuit remanded the case for a new trial, the OSI investigated and substantiated Mr. Walus's alibi, and dismissed the charges against him. See Pet. Exh. 225 (OSI statement signed by Allan Ryan, Director, and Thomas P. Sullivan, United States Attorney for the N.D.Ill., dismissing *United States v. Walus*); see also *United States v. Walus*, No. 77 C 279, slip op. (N.D.Ill. Nov. 26, 1980).

[67] Parker testimony, vol. I at 72-73.

OSI's Relations with Jewish Groups

In October of 1980, during a management review at the Department of Justice, Allan Ryan sent a memorandum to Philip B. Hyman, Assistant Attorney General of the Criminal Division, providing answers to questions which the reviewer had posed to him.[68] Mr. Ryan listed among his "significant accomplishments":

> 6. Advancing and consolidating the initiative begun in January 1980 to secure support in Congress, Jewish community organizations, and the public at large for OSI. Press coverage has been substantial and favorable and support from Chairwoman [Elizabeth] Holtzman and Jewish organizations is now secure (recognizing that this support cannot be taken for granted and must be reinforced at every opportunity).[69]

Although this memorandum discusses the political concerns of OSI's Director, it is not prima facie evidence of improper influence on the part of Members of Congress or Jewish organizations. Mr Ryan testified that his efforts to foster better relations with these groups were, in part, a response to the criticisms which the OSI had suffered during the preceding year.[70] There is nothing in the record to suggest that Mr. Ryan acted unethically in this regard, or permitted his subordinates—who conducted the litigation in the OSI—to be affected by political considerations. Indeed, it would be surprising if a Director of a subdivision of the Department of Justice were unconcerned with Congress's and the public's perception of the value of his or

---

[68] See Ryan's Exh. 6. Mr. Ryan prepared a similar document in 1981. See Pet. Exh. 228.

[69] Id. at 2.

[70] See Ryan testimony at 89.

her office. Mr. Ryan's dismissal of the *Walus* case two months after writing this memorandum strongly suggests that he did not permit his concern for these groups' views to influence the OSI's decisions in individual cases.

There is simply no substantial evidence that government lawyers succumbed to political pressure in Mr. Demjanjuk's case. Although several attorneys testified that they were aware of political pressure on the OSI during the period of 1978-1980,[71] the lawyers involved in the presentation of the Demjanjuk case testified that they felt themselves insulated from these forces, and all witnesses concurred that political pressure played no role in the tactical decisions made about Mr. Demjanjuk's case.[72] The evidence which suggests that political motivations played a role in the decisions regarding whether, and how, to prosecute Mr. Demjanjuk, is easily explained when viewed in its proper context.

E. The Fedorenko Protocols

Government prosecutors learned from Feodor Fedorenko, during his denaturalization trial, that Soviet investigators had previously interviewed him and six other Treblinka witnesses. The Court in the *Fedorenko* case directed the government to inquire into these materials, and over the summer of 1978, the SLU requested, and received, statements from the U.S.S.R. of Soviets who had worked as guards at the Treblinka death camp.

Shortly after Memorial Day in May, 1978, the denaturalization trial of Feodor Fedorenko began. Mr. Fedorenko

---

[71] See Parker testimony, vol. I at 70-74; Mendelsohn testimony at 81-90; Couvillon deposition at 110-112.

[72] See Parker testimony, vol. I at 168-69; Mendelsohn testimony at 142; Moscowitz testimony at 151; Ryan testimony at 105; Rockler deposition at 62; Couvillon deposition at 135.

had travelled to the Ukraine three times since his departure as a German POW in 1941.[73] During a trip in 1973, officials in the former Soviet Union investigated allegations that Mr. Fedorenko had been a guard at the Treblinka death camp. Soviet officials interrogated Mr. Fedorenko and six other witnesses to the events at Treblinka.[74] Mr. Fedorenko claimed that the Soviet investigation had exonerated him of any wrongdoing, and he moved at the beginning of his trial for a continuance of the proceedings to enable him to obtain this evidence from the Soviet Union.[75] Judge Roettger, presiding over the Fedorenko case, "urged both sides to begin immediately to obtain more information about the potential witnesses and the procedures available and necessary to obtain the evidence from them."[76]

Apparently prompted by the Court's admonition, Martin Mendelsohn, as Director of the SLU, requested the State Department to ask the Soviet Ministry of Foreign Affairs for their assistance in locating information concerning this 1973 investigation, and in identifying and

---

[73] See *United States v. Fedorenko*, 455 F.Supp. 893, 909 (S.D.Fla. 1978).

[74] Id. Mr. Fedorenko claimed that the six men were Nikolai Korotkey, Wasyl Wasylenko, Michael Dudnik, Petro Schelno, Ivan Schevchenko, and Nikolai Rohoza.

[75] Id.

[76] Id. Judge Roettger eventually concluded that the evidence was not necessary, presumably in light of his lack of belief in the credibility of the survivor testimony. See id. at 910, 901-905.

locating the six named witnesses.[77] Mr. Mendelsohn travelled to the U.S.S.R. in late July of 1978, where he met with Nicholai Zhukov, an official with the Ministry of Justice. The men talked about Soviet/American cooperation in war crimes trials, and Mr. Mendelsohn specifically asked about the earlier Fedorenko request.[78]

Shortly thereafter, Judge Roettger ruled in Mr. Fedorenko's favor,[79] and during the subsequent weeks, the request made of the Soviets became more urgent for the American prosecution team, who felt that it provided an opportunity for additional inculpatory evidence which

---

[77] On June 5, 1978, the State Department sent a cable to the U.S. embassy in Moscow. Pet. Exh. 96. See also Mendelsohn testimony at 90-92.

Undoubtedly through faulty memories of these fifteen-year old events, Mr. Couvillon does not recall asking Mr. Mendelsohn to make the request of the State Department. See Couvillon deposition at 28-31. Because Mr. Mendelsohn did make the request, and because Mr. Couvillon was the SLU's sole attorney working on the Fedorenko prosecution team, it seems likely that he spoke to Mr. Mendelsohn about the Court's directive.

Mr. Couvillon testified that even after he learned of Soviet war crimes trials, he believed that Soviet justice in the years immediately following the war was likely to be summary, and that the individuals questioned would have been executed. He concluded that they would not have been available, therefore, to testify in either 1973, when Mr. Fedorenko claimed they had been interrogated, or in 1978, when the Fedorenko denaturalization trial took place in this country.

[78] See Pet. Exh. 98 (cable from Secretary of State to INS General Counsel David Crosland, dated July 25, 1978). Coincidentally, this cable was sent on the day Judge Roettger released his decision in the Fedorenko case.

[79] *United States v. Fedorenko*, 455 F.Supp. 893 (S.D.Fla. 1978).

could be used during the appeal.[80] While Mr. Mendelsohn travelled from the U.S.S.R. to Israel, U.S. consular officials in the Soviet Union requested "urgent delivery" of the Fedorenko materials, and cited the recent loss in the District Court. Soviet officials promised to expedite the request.[81]

In early August, Mr. Mendelsohn discussed with Israeli officials (including Col. Russek) the loss in *Fedorenko,* and procedures to be followed in future cases.[82] The day following the last of Mr. Mendelsohn's meetings in Israel, American consular officials in Moscow again checked on the status of the request with Soviet officials, who replied that they had located the materials, and that they were on their way.[83] Five days later, the American embassy in Moscow cabled the State Department that it had received the Fedorenko materials, and would be sending them by diplomatic pouch to the SLU in Washington.[84]

The Soviet materials which the government received in 1978 (called, alternatively, the "Fedorenko protocols," or the "1978 protocols"—these Findings of Fact and Conclusion of Law will use the former term) included a list of

---

[80] Given the timing of Mr. Fedorenko's Motion for a Continuance and the SLU's request to the U.S.S.R., it is quite clear that the SLU placed the initial request in a good-faith attempt to comply with Judge Roettger's directive. See also Mendelsohn testimony at 95-96.

[81] See Pet. Exh. 101 (cable from United States Embassy, Moscow, to Secretary of State, dated August 1, 1978).

[82] See Pet. Exh. 103 (cable from Mendelsohn, dated August 8, 1978). The meetings were held on August 4 and 6, 1978. Id.

[83] See Pet. Exh. 102 (cable from United States Embassy, Moscow, to United States Embassy, Tel Aviv, dated August 7, 1978).

[84] See Pet. Exhs. 104, 64A (identical) (cable from United States Embassy, Moscow, to Secretary of State, dated August 12, 1978).

contents,[85] nineteen statements or transcripts of interrogations (from eleven individuals),[86] and a German-language document describing the transfer of guards from the Trawniki training camp to the Sachsenhausen concentration camp.[87] Curiously, the Fedorenko Protocols contain statements from only three of the six witnesses Mr. Fedorenko had named, and contain five statements[88] generated in 1978 prior to the United States' request on June 5.

Of the government attorneys who worked on the Demjanjuk case, only George Parker and Norman Moscowitz had read the Fedorenko Protocols prior to Mr. Demjanjuk's denaturalization.

Despite the frantic pace which characterized the Fedorenko Protocols' acquisition, the documents languished over the next several months. The State Department provided them, along with translations, to the SLU on October 13, 1978,[89] where they were distributed to

---

[85] See Pet. Exh. 149B.

[86] See id. for the list of these statements. The record of the photographic identification by Mr. Dorofeev (the second item on the list) was not produced as an exhibit in these proceedings. The remainder are produced as Pet. Exhs. 149C – V.

[87] Pet. Exh. 149S. The note from the Mininstry of Foreign Affairs which accompanied the protocols also asserted that Mr. Fedorenko was not criminally liable in the Soviet Union. Apparently, this statement was premature; following his deportation to the Ukraine in 1984, Mr. Fedorenko was arrested, tried for treason and war crimes, and received the death sentence in 1986. The Soviet government executed him in Moscow in 1987. See "Ex-Nazi Fedorenko Executed by Soviets," *Chicago Tribune*, July 28, 1987, at 5.

[88] Those of Messrs. Dorofeev, Savenko, and Malagon.

[89] See Pet. Exh. 110 (letter from Lois M. Day, Acting Chief, Claims, Deaths and Judicial Services Division, Department of State to Mendelsohn, dated October 13, 1978).

Martin Mendelsohn and Donald Couvillon.[90] Nevertheless, because of the manner in which the Solicitor General's office (successfully) framed the issues in the *Fedorenko* appeal,[91] and because of the then-raging turf battle over the Demjanjuk case, the Protocols were unread by lawyers working on both cases.

The Fedorenko Protocols were insignificant to the government's appeal in the Fedorenko case, which the government based largely on the question of whether Fedorenko's failure to reveal his admitted service as a guard at Treblinka constituted a material misrepresentation or concealment.[92] Moreover, although Martin Mendelsohn testified that he had assigned Donald Couvillon to work on the Fedorenko appeal,[93] it appears instead that Mr. Ryan (then working in the Solicitor General's office) handled it alone, and that Mr. Couvillon played no role in it.[94]

In any event, neither of the Protocols' recipients at the SLU—Mr. Mendelsohn and Mr. Couvillon—read the documents when they arrived from the State Department. Mr. Mendelsohn testified that he remembers receiving the protocols, but not reading them.[95] Mr. Couvillon did not

---

[90] Id. (cover slip with initials "DAC" and "MM"); Mendelsohn testimony at 128.

[91] See *United States v. Fedorenko*, 597 F.2d 946 (5th Cir. 1979), aff'd 449 U.S. 490 (1981).

[92] See id. at 948; Ryan testimony at 54.

[93] Mendelsohn testimony at 130-31.

[94] See Couvillon deposition at 54, 56; id. at 147 (stating that "I never did a thing on the Fedorenko appeal. I didn't even know what was going on.")

[95] See Mendelsohn testimony at 99, 129-30 (stating that he did not read the material because "that is what I relied on, someone like Don Couvillon for.")

recall receiving the Protocols, although he had vague recollections of a large package arriving at the office to which he paid no attention.[96]

The attorneys' failure to review the Fedorenko Protocols with respect to the Demjanjuk litigation is explained by the dispute over control of that case which reached its peak at that same time.[97] The Protocols arrived at the SLU on October 16, 1978, nine days before Mr. Mendelsohn wrote to INS General Counsel David Crosland, asking for control of the Demjanjuk case,[98] and a month before Associate Attorney General Michael Egan handed control over the case to Mr. Mendelsohn.[99] Mr. Couvillon described this period as one of great uncertainty, and explained his failure to review the Protocols as a result of his losing control of the case to Mr. Mendelsohn.[100] Even though Associate Attorney General Egan's November 16, 1978 letter[101] placed Mr. Mendelsohn in charge of the Demjanjuk case, as has been noted above, Mr. Mendelsohn believed that he had delegated tasks such as reviewing the Protocols, and did not review them himself.[102] Unfortunately, during this period, although Mr. Mendelsohn was nominally in charge of the Dem-

---

[96] Couvillon deposition at 62-63, 66, and 121.

[97] See section II.D.

[98] See id.; Pet. Exh. 13 (letter from John Martin to Privacy Staff, Department of State, dated June 11, 1979).

[99] Pet. Exh. 114.

[100] See Couvillon deposition at 63 (stating that there was much "confusion over who was going to do what, and then [Mr. Mendelsohn] took the case over, and then—I didn't do anything unless he told me to do it").

[101] Pet. Exh. 114 (letters to U.S. Attorney Williams from Associate Attorney General Egan, dated November 16, 1978).

[102] Mendelsohn testimony at 129-30.

janjuk case, it was in fact adrift, and the Protocols apparently remained unread.[103]

Given that neither of the Protocols' recipients read them upon receiving the documents, it is not surprising that Mr. Ryan, who conducted the Fedorenko appeal from the Solicitor General's Office, never saw them in preparing for the appeal.[104] Nor did he review them upon becoming Deputy Director at the OSI fifteen months later.[105]

Finally, in 1979, OSI attorneys George Parker and Norman Moscowitz both reviewed the Fedorenko Protocols in preparing the Demjanjuk case. George Parker's notes,[106] written in 1979 to consolidate background information on the Treblinka death camp and the operation of the gas chambers, refer repeatedly to four of the Fedorenko Protocols: those of Yeger, Korotkikh, Malagon, and Leleko.[107] In addition, Mr. Mowcowitz closely read the Protocols, and he spent a substantial amount of time attempting to reconcile them with the other evidence.

---

[103] An example of this lack of direction can be seen in Pet. Exh. 94, which is a letter John Horrigan sent to Mr. Couvillon, asking him to review Soviet evidence for information on Mr. Demjanjuk's hospitalization and military sevice. Mr. Couvillon did not take any action on this request. See Couvillon deposition at 108-09.

[104] See Ryan testimony at 56-58.

[105] See id. at 10-11. Mr. Ryan first learned of the Protocols' existence from OSI attorney Eli Rosenbaum in 1991, when the men discussed Mr. Ryan's concerns about publicity the case was receiving. See id. at 76-79. Mr. Ryan first received the Protocols in 1992, in a form letter from then-Assistant Attorney General Robert Mueller to him, responding to a letter expressing his concern over the Department of Justice's handling of the publicity. Id. at 25, 135; see also Pet. Exh. 235 (letter from Ryan to Associate Attorney General Robert Mueller, dated June 15, 1992).

[106] See section II.I.1.

[107] See id; Parker testimony, vol. I at 84-85, vol. II at 40-41.

(Mr. Parker's and Mr. Moscowitz's interpretation of the Protocols is discussed below.)[108]

Mr. Moscowitz's co-counsel at trial, John Horrigan, testified that he received a copy of the Fedorenko Protocols from Mr. Moscowitz only after the denaturalization trial was completed, and as the men sorted through their files. Mr. Horrigan did not read them at that time, but saved them, in a box of memorabilia, along with copies of other documents. He found them in that box in 1992.[109]

Sometime after the denaturalization trial in the winter of 1981, the Fedorenko Protocols became missing from the Demjanjuk case files. Judge Einhorn, who inherited the case from Mr. Moscowitz, was unaware of the Protocols' existence until they were provided to him in anticipation of his testimony before me.[110] This ignorance precluded him from providing them to the Israeli prosecutors when they requested information from the OSI in December, 1985.[111]

The Protocols surfaced again in the spring and summer of 1991, when Representative James Traficant submitted a Freedom of Information Act request for materials in the Department of Justice's possession relating to Fedorenko.[112] Apparently, the OSI staff assigned to assemble the documents responsive to the Congressman's

---

[108] See section II.I.1.

[109] Horrigan testimony at 304-310.

[110] See Einhorn testimony at 16, 21-26; id. at 22 (stating that "I never reviewed the Fedorenko files in conjunction with whatever assignments I was given with regard to the Demjanjuk case.")

[111] See section II.R. The protocols Judge Einhorn described in his memorandum to Neal Sher containing his draft responses to the Israeli requests were the 1981 Protocols (see below). See Sher testimony at 85-86; Einhorn testimony at 28.

[112] See Sher deposition at 37.

request found the Protocols during a search of the Fedorenko file.[113] It was not until the Protocols turned up in this search that OSI Director Neal Sher saw them for the first time.[114]

F. The Polish Main Commission Information

During his trip to the Soviet Union in July, 1978, Martin Mendelsohn also travelled to Poland, where he met in Warsaw with Dr. Czeslaw Pilichowski, the Director of the Polish government's Main Commission for the Investigation of Hitlerite Crimes in Poland.[115] Mr. Mendelsohn was disappointed to learn during his tour of the Commissioner's facilities that their archives were small and contained few original documents.[116]

Despite the poor appearances, on October 11, 1978, the two SLU attorneys and the two Assistant U.S. Attorneys in Cleveland met and agreed that, among other steps to be taken in the investigation of the Demjanjuk case, the SLU would ask the Commission for information it had on Mr. Demjanjuk.[117] Donald Couvillon, one of the SLU attorneys assigned to the Demjanjuk case, asked Mr. Mendelsohn to write Dr. Pilichowski with the SLU's request in Mr. Demjanjuk's and two other cases.[118] Mr. Mendelsohn drafted the request that same week, but no

---

[113] Id. at 37.

[114] Id. at 41.

[115] See Mendelsohn testimony at 92.

[116] Id.

[117] See Pet. Exh. 113 (memorandum from David Crosland to Martin Mendelsohn, dated October 25, 1978).

[118] See Pet. Exh. 111 (memorandum from Couvillon to Mendelsohn, dated October 19, 1978); Couvillon deposition at 104. One of the other cases was that of Liudas Kairys. See also section II.M.

response came from Poland.[119] On January 17, 1979 (after he had been placed in charge of the Demjanjuk case), Mr. Mendelsohn asked Mr. Couvillon to verify that the Polish Commission request had been sent (among other things).[120] Thereafter, the status of the request, like the Fedorenko Protocols themselves, was lost in the transition from Messrs. Parker and Moscowitz.

Upon acquiring the case in July, 1979, Norman Moscowitz drafted a second request under Mr. Mendelsohn's name, which was sent to the Commission.[121] On August 31, 1979, Dr. Pilichowski wrote a letter responding to the OSI's request, saying that the Commission had no information on Mr. Demjanjuk.[122] Nevertheless, Dr. Pilichowski enclosed copies of two Polish-language documents: the first was an article from a book titled (in Polish) "Hitler Camps on the Polish Soil 1939-1945"; the second was an article about Treblinka published in 1975 in the Commission's Bulletin written by Stanislaw Wojtczak.[123]

The Wojtczak article contained near its end a list of known guards. Translated, the article reads:

---

[119] See Pet. Exh 112 (letter from Mendelsohn to Dr. Czeslaw Pilichowski, dated October 24, 1978).

[120] See Pet. Exh. 118 (memorandum from Couvillon to Mendelsohn). It is unclear whether Mr. Mendelsohn's October 24, 1978 letter was ever sent on to the Commission. Donald Couvillon does not recall any actions taken to attempt to obtain information from the Commission. See Couvillon deposition at 103.

[121] See Pet. Exh. 120 (letter from Mendelsohn to Dr. Pilichowski, dated July 27, 1979); Moscowitz testimony at 63.

[122] Pet. Exh. 156 (letter from Dr. Pilichowski to Mendelsohn dated August 31, 1979).

[123] Id.

> The following names are among those known from the approximate [sic] 100 guards: Andrejew, Binimen, Bondare Peter, Bondarenko Mikolaj, Dmitrenko Piotr, Duszenko Fiodor, Fedorenko Mikolaj, Gonzural Mikolaj, Jeger Sasza, Jelentschuk Wasil, Kolaznikow, Kostenko, Kowalenko, Loch, Marczenko Iwan, Martoszenko Moisej, Melnik Teodozy, Mikoda, Nidorsrelow Mikolaj, Onoprijenko Daniel, Oscyzanski Mikolaj, Pilman, Polakow Leon, Rittich Aleksander, Rogoza, Rogow, Rubez Grigorii, Rudenko Wasyl, Safonow, Scheffef Mikolaj, Schischajev Wasil, Schwidkin Iwan, Senykow Mikolaj, Skudowa, Strebel, Strejber, Szulc, Tscherniawskij, Wladimir, Urnau Jakub, Wasilenko Iwan, Woloszyn Wasyl, Woronkow.[124]

As can be seen from the list, there is no mention of Mr. Demjanjuk. However, the list does name "Marczenko Iwan" as a guard, as well as "Fedorenko Mikolaj."

As with the Fedorenko Protocols, the only government attorneys who received and read the Polish Main Commission list were George Parker and Norman Moscowitz.[125]

---

[124] Id. at 154 (note that there are two pages of the translation marked 154—the list is on the first such page).

[125] Apparently, Mr. Mendelsohn also saw the list, but based on his understanding of its source, dismissed it as "valueless." See Mendelsohn testimony at 118.

Mr. Ryan had viewed the Polish Main Commission as a critical source in the *Walus* case. See Pet. Exh. 225 at 4-5 (statement to Allan Ryan, Jr., and Thomas Sullivan, dated November 26, 1980); Ryan testimony at 47-49; Allan A. Ryan, Jr., *Quiet Neighbors* 215 (1984). Nevertheless, no lawyer associated with the Demjanjuk case—including Mr. Ryan—viewed the Commission's Treblinka list as significant. Mr. Ryan testified that he did not view the Commission's Treblinka guard list as authoritative because so few records of the death camp

Mr. Parker, who had no recollection of Mr. Mendelsohn's disappointment following his trip to the Commission's archives,[126] testified that he had looked forward to receiving a response from the Commission and was very disappointed by the materials they eventually received.[127] At the time, Mr. Parker perceived the list to have "relatively no value" because it provided no information on Mr. Demjanjuk.[128] Mr. Parker was not aware that the name "Marczenko" was on the list, and he attached no importance to that fact.[129] He made no recommendation regarding production of the list to Mr. Demjanjuk's counsel in discovery.[130]

The list had more significance for Mr. Moscowitz, but not with regard to the Demjanjuk case. In a section of the article dealing with the Treblinka labor camp, a list of guards at that separate facility included the name of Liudas Kairys, whom the government was prosecuting in Chicago.[131] Mr. Moscowitz produced the Wojtczak article

---

remained following its razing in November, 1943. Ryan testimony at 124. The documents the OSI reviewed in the *Walus* case were from cities in which Mr. Walus was alleged to have served in the German Gestapo. The Operation Reinhard death camps, however, were controlled not by the Gestapo, but by a separate administration established for that purpose under the Reich Chancellery, and headed by Odilo Globocnik. Participants in Operation Reinhard were sworn to secrecy. See Alexander Donat, ed., *The Death Camp Treblinka* 271-72 (1979).

The other attorneys testified that they did not see the list during their tenure with the government. See Horrigan testimony at 318-19; Ryan testimony at 23, 125; Einhorn testimony at 31.

[126] See Parker testimony, vol. I at 190.

[127] Id. at 160-161.

[128] Id.

[129] Id. at 161, 191.

[130] Parker testimony, vol. I at 32.

[131] Pet. Exh. 156 at translation page 18.

during discovery in that case to Mr. Kairy's attorney, David Springer, who wrote Mr. Martin and mentioned the article.[132] With respect to the Demjanjuk case, Mr. Moscowitz was disappointed to find that Mr. Demjanjuk's name was not listed. As in the Kairys case, Mr. Moscowitz had come to expect that a list would exist with Mr. Demjanjuk's name on it, and when the name did not turn up on the Commission list, it was a disappointment, although not a cause for great concern.[133] Mr. Moscowitz did not provide the Commission list to Mr. Demjanjuk because he did not believe that it related to his case.[134]

G. German SS Officer and Survivor Witnesses

In January, 1979, Donald Couvillon corresponded with Gitta Sereny, an author who wrote a seminal book on the history of Treblinka, *Into That Darkness,* based largely on interviews she conducted with former SS officers who participated at Treblinka, including the camp's Commandant, Franz Stangl.[135] Ms. Sereny provided to Mr. Couvillon the names of the officers with whom she had spoken, and

---

[132] Moscowitz testimony at 53, 234-35; Springer deposition upon written questions at 2-3 (response to Mr. Demjanjuk's cross-question 2).

[133] See Moscowitz testimony, vol. I at 54-55, 261; Parker testimony at 47. See also the discussion, at section II.1.2.a, regarding Mr. Parker's memorandum dated February 28, 1980.

[134] Moscowitz testimony at 260.

[135] See Pet. Exh. 115 (memorandum to the file from Mr. Couvillon, describing conversation with Ms. Sereny); Pet. Exh. 116 (memorandum from Mr. Couvillon to Martin Mendelsohn and the file dated January 15, 1979, and describing a substantive conversation with Ms. Sereny).

See also Gitta Sereny, *Into The Darkness* (1974). Stangl died in prison in 1971 of a heart attack while serving a life sentence for his participation at Treblinka. See id. at 365.

her assessment of the strengths and weaknesses of each witness.[136] Among those she suggested he speak to were Kurt Franz (Stangl's deputy at the camp), Otto Horn, and Franz Suchomel (both former members of the SS and participants at Treblinka). All three were living in Germany. Mr. Couvillon located Mr. Horn in 1979.[137]

Upon picking up the Demjanjuk case following Mr. Couvillon's departure in 1979, Norman Moscowitz and George Parker followed up on the SS leads which Ms. Sereny had provided. In August, 1979, Messrs. Moscowitz and Parker sent a memorandum to the Foreign Litigation Unit of the Department of Justice, seeking their assistance in locating and interviewing Suchomel and Franz.[138] Mr. Couvillon had previously engaged the assistance of an American consular officer in Germany, Jane Whitney,[139] who had succeeded in persuading Suchomel to talk to the OSI attorneys.[140] The Foreign Litigation Unit contacted Gerald Charig, its resident attorney in Germany, and passed on the OSI's request for his assistance.[141] Mr. Charig arranged the interviews of Franz and Suchomel for early September.

1. Franz Suchomel

Franz Suchomel was a Sudeten German who first worked with the German SS in the T4 euthanasia program.[142] Upon its termination, he was transferred to *Aktion Reinhard* in Poland, and arrived at Treblinka in late

[136] See Pet. Exh. 116.

[137] See Couvillon deposition at 115-16.

[138] Pet. Exh. 154 (memorandum from Parker and Moscowitz to Bruno Ristau, dated August 7, 1979).

[139] See Couvillon deposition at 117.

[140] See id.; Charig deposition at 20.

[141] See Charig deposition at 19.

[142] See section II.A.

August, 1942.[143] While at Treblinka, Suchomel worked in the lower camp, supervising the collection and processing of the valuables of Jewish prisoners.[144] He remained at the camp until its liquidation in late November, 1943.[145] Suchomel was tried and convicted in the First Treblinka Trial in Dusseldorf in 1965. He received a seven-year sentence, from which he had been released at the time the OSI attorneys interviewed him in 1979.

On September 4, 1979, Messrs. Moscowitz, Parker, and Charig met with Suchomel at the American Consulate.[146] The meeting lasted less than an hour,[147] and was not recorded in any fashion.[148] The attorneys have little present recollections of the meeting with Suchomel, except that he was a frail, elderly man who cried when talking about the past.[149] Apparently, the attorneys showed Suchomel a photospread containing a photograph of Mr. Demjanjuk, but he was unable to identify him.[150]

---

[143] Sereny, *Into That Darkness* 157 (1974).

[144] See Alexander Donat, ed., *The Death Camp Treblinka* 278 (1979); Pet. Exh. 61A at numbered page 16.

[145] Pet. Exh. 61A at numbered page 14.

[146] See Charig deposition at 19, 22; Parker testimony, vol. I at 164.

[147] Parker testimony, vol. I at 164; Charig deposition at 53.

[148] See Charig deposition at 23; Parker testimony, vol. I at 105.

[149] Regarding their recollections, see Moscowitz testimony at 74-75; Parker testimony, vol. I at 45, 165. Regarding Suchomel's condition, see Charig deposition at 29 (quoting Suchomel, crying: "Those were terrible times"); Parker testimony, vol. I at 45; Moscowitz testimony at 177-78. See also Sereny, *Into That Darkness* at 157 (stating that Suchomel had a heart condition and found it difficult to speak about Treblinka).

[150] See Parker testimony, vol. I at 79; Moscowitz testimony at 74. Mr. Charig has no recollection of the presentation of the photospread. Charig deposition at 56.

Sometime after the September, 1979 meetings with Suchomel and with Alfred Speiss, the prosecutor in the First Treblinka Trials in Dusseldorf,[151] George Parker wrote down a page of notes on the information they received from those sources, and from survivors.[152] According to the notes, Suchomel told the attorneys that Ivan:

> Came w/ initial crew of UK [(Ukrainians)], stayed on in Sept when Wirth changed most UK.[153]

According to Mr. Parker's February 28, 1980, memorandum, Suchomel also told the men that Ivan rarely left the camp.[154]

Although Suchomel had worked in Camp 1 at Treblinka, and not at Camp 2, where the gas chambers were located, during a preliminary proceeding in Germany in October, 1960, he described the operators of the gas chambers at the death camp:

> When trainloads arrived, it was first and foremost the Ukrainian guard squad and the Jewish worker squads that were in charge. The Germans stayed in the background. Also two members of the guard squad were on duty in the upper camp at the gas chambers. Their names were Ivan and Nikolai. As far as I know, there was some kind of order that Germans should not be involved in the actual killing.[155]

Although Mr. Charig recalled being asked to obtain records of German war crimes trials, and recalls the OSI

---

[151] See Sereny, *Into That Darkness* at __ 229.

[152] Pet. Exh. 77.

[153] Id.

[154] See Pet. Exh. 72 at 4; see also section II.I.2.a.

[155] Pet. Exh. 61A at 17.

attempting to locate the records,[156] Mr. Parker has no recollection of seeing this synopsis of Suchomel's 1960 testimony.[157] Mr. Suchomel apparently died in late 1979.[158] Despite his frail condition, the lawyers took no steps to perpetuate his testimony.[159]

The other OSI attorneys remained relatively ignorant of Suchomel: John Horrigan testified that although he was aware of the interview, his only recollection of it was that Mr. Moscowitz believed following the interview that Suchomel was "a liar";[160] Allan Ryan, Jr., testified that he was unaware of Suchomel in 1980;[161] Walter Rockler testified that he does not now recognize Suchomel's name.[162]

2. Kurt Franz

When the attorneys interviewed Kurt Franz a few days later,[163] the meeting was both more memorable and less informative. Kurt Franz was, like many of the other SS personnel at *Aktion Reinhard* death camps, an alumnus of the T4 euthanasia program. He was first assigned to the Sobibor death camp, and transferred to Treblinka along

---

[156] See Charig deposition at 44-45.

[157] Parker testimony, vol. I at 43.

[158] See Parker testimony, vol. II at 52, 68.

[159] Moscowitz testimony at 45. See also Charig deposition at 53 (stating that he did not know at the time that Suchomel was in poor health).

[160] Horrigan testimony at 299.

[161] Ryan testimony at 22.

[162] Rockler deposition at 41.

[163] See Charig deposition at 26.

with his superior, Franz Stangl, in August, 1942. Although the Jewish prisoners nicknamed him "Lalke" (Yiddish for "the doll") because of his good looks, as a sadist he was the rival of Ivan the Terrible. Among other atrocities Franz committed, he incited his dog "Barry" to bite the genitals of prisoners—a task for which Franz had trained him.[164] Because of this reputation, George Parker was reluctant to speak with Franz.[165]

Kurt Franz was the principal defendant in the First Treblinka Trial in Düsseldorf in the mid-1960s. He received a life sentence, which he was serving at the time of his interview in September 1979.

Mr. Charig arranged the interview with Franz, and he and Messrs. Moscowitz and Parker travelled to the prison where Franz was incarcerated and attempted to interview him.[166] Mr. Moscowitz does not recall today anything

---

[164] See Alexander Donat, ed., *The Death Camp Treblinka* 276-77 (1979); Yitzhak Arad, *Belzec, Sobibor, Treblinka: The Operation Reinhard Death Camps* 189-191 (1987).

[165] Parker testimony, vol. II at 34.

[166] See Moscowitz testimony at 50; Charig deposition at 23.

Mr. Charig's recollection of this meeting differs substantially from those of Mr. Parker and Mr. Moscowitz. Mr. Charig testified that he is "99 percent certain" that John Horrigan attended the interview, and that Franz refused entirely to participate:

Q. Let me direct your attention to the Kurt Franz and Suchomel interviews once again. Were you aware at the time of those interviews that photo spreads were being shown to Franz and Suchomel in an attempt by OSI to get a photo identification of Ivan the Terrible.

A. I must tell you something. There is some mistake in your question. Kurt Franz did not give an interview at all, and he was not shown any photo spread. Kurt Franz was brought into the office, that little office in the prison, and he was told these are the American gentlemen who want to interview you. And he took on a military posture with his arms on the side of his pants seams,

Franz said to them at the interview,[167] but believed that Franz was dishonest.[168] There was no reporter present, and Mr. Parker testified that he has a vague recollection that they took no notes.[169]

The attorneys presented to Franz a photospread containing a photograph of Mr. Demjanjuk. Although

---

and he said, "I did only my duty. I was tried. I am serving a life sentence. I will not say anything," or words to that effect. That was the entire interview.

Q. All right. Would I be correct in assuming that you were present from the time he was brought in on that occasion until the time he left?

A. Throughout, I was present.

Q. And he made no other statements to OSI officials; is that correct?

A. He made no other statements, certainly no other statement, nothing about the subject matter of the case.

Q. And you are sure he was never shown any photograph on that occasion?

A. I'm sure he was not shown photographs.

Charig deposition at 55-56.

It is difficult to reconcile this testimony with that of Mr. Parker, who specifically recalled Franz lingering over the photographs of Mr. Demjanjuk. Of course, Mr. Charig may be mistaken in his asserion that Franz was not shown photographs. Another explanation is that he possibly recalled an attempted second visit—perhaps at the time of Otto Horn's videotape deposition, when Mr. Moscowitz and Mr. Horrigan travelled to Germany together—at which Franz was even more obdurate than the interview Mr. Parker recalls. There is no other evidence supporting this inference, however. In any event, the point is immaterial.

In addition, Martin Mendelsohn testified that he was present at Franz's interview. See Mendelsohn testimony at 137. Perhaps Mr. Charig mistook Mr. Mendelsohn for Mr. Horrigan.

[167] See Moscowitz testimony at 177-79.

[168] Id. at 179.

[169] Parker testimony, vol. I at 105; Charig deposition at 24.

George Parker recalled that Franz "pondered very long and very hard" over the photograph of Mr. Demjanjuk, he did not identify any of the pictures.[170]

3. Survivor Witnesses

From Germany, Messrs. Parker and Moscowitz travelled to Israel, where they interviewed several survivors of the death camp living in that country. They interviewed all of the witnesses who had given statements to the Israeli police officials, including those who were unable to identify Mr. Demjanjuk's photograph.[171] Because of the differences between the witnesses' statements, Mr. Moscowitz concluded that they had not been coached.[172] The attorneys also interviewed Martin Kolar, an Israeli police official, and concluded that he was an honest person who was interested in following proper procedures.[173] Although he, too, found the witnesses to be credible, Mr. Parker was concerned that eyewitness identification of a person after forty years was inherently troublesome.[174]

During the next six months, the OSI attorneys and investigators showed photospreads to more survivors of Treblinka, Sobibor, and Flossenburg.[175] Although no survivors from the latter two camps identified Mr. Dem-

---

[170] See Parker testimony, vol. II at 34; Moscowitz testimony at 74; Mendelsohn testimony at 137.

[171] Moscowitz testimony at 157.

[172] Id. at 160.

[173] Id. at 161.

[174] Parker testimony, vol. II at 46.

[175] See Pet. Exh. 30 (summarizing survivors who identified Mr. Demjanjuk and those who did not); see also Pet. Exh. 166 (request from Allan Ryan, Jr., to Charles Ryman of the State Department to have survivors interviewed).

janjuk's photographs, investigators obtained identifications from several other Treblinka survivors. By the conclusion of the investigation, a total of eighteen Treblinka survivors from around the world had identified Mr. Demjanjuk's photograph as depicting a Ukrainian guard at the death camp.[176]

4. Otto Horn

In November, 1979, Norman Moscowitz travelled to Germany to interview another former SS man—Otto Horn. Mr. Horn was a nurse who had also been a participant in the T4 euthanasia program. Horn worked at Treblinka from September, 1942, until September of 1943, where he supervised the burning of bodies in Camp 2.[177] Horn had been acquitted of war crimes in the First Treblinka Trial in Düsseldorf in 1965,[178] and was reluctant to become involved with the American investigators.[179] Mr. Moscowitz spoke again to Mr. Charig, who was fluent in the German language. Mr. Charig prevailed upon Horn, who eventually relented and agreed to cooperate.[180]

---

[176] See Resp. Exhs. 45, 46.

In all, there were nine Israeli survivors (Abraham Goldfarb, Eugene Turowski, Elijahu Rosenberg, Josef Czarny, Gustaw Boraks, Abraham Lindwasser, Sonia Lewkowicz, Pinhas Epstein, and Jacob Szmulowicz); one German survivor (Georg Rajdgrodzki); six American survivors (Mayer Zigelmen, Edward Goldstein, Moses Rapaport, Henry Brenner, Abram Kolski, and Harry Feldgraber); one survivor from Uruguay (Chil Rajchman); and one Swedish survivor (Czeslaw Augustyniak).

[177] Sereny, *Into That Darkness* 86-88, 167.

[178] Id. at 196.

[179] See Moscowitz testimony at 180, 185; Charig deposition at 48-51.

[180] Charig deposition at 182.

Mr. Moscowitz travelled to Germany in November, 1979, to interview Mr. Horn, to meet with a German expert the Office planned to use at trial, and to meet with German and Austrian officials.[181] He contacted and met George Garand, an OSI historian, and Bernard Dougherty, an OSI investigator, who were already in Germany on a three-month investigative and research tour.[182] Mr. Moscowitz wanted Mr. Dougherty present at the interview because of his investigative experience, and wanted Mr. Garand there to translate between him and Mr. Horn, who spoke no English.[183]

The three men met briefly before travelling to see Mr. Horn, and on November 14, 1979, they drove to Mr. Horn's apartment in Berlin for the interview. The interview and photographic identification took place in the small living room of Mr. Horn's apartment.

With Mr. Garand interpreting, Mr. Moscowitz interviewed Mr. Horn about his service at Treblinka. Upon being shown a sketch of the Treblinka death camp, Mr. Horn identified several buildings, and offered details about the history and operation of the camp.[184] Mr. Moscowitz questioned Mr. Horn about the operation of the gas chambers, and Mr. Horn described two Ukrainian guards who worked under the supervision of a German named Schmidt.[185] Mr. Horn identified one of the Ukrainians

---

[181] Moscowitz testimony at 282.

[182] See Moscowitz testimony at 75, 180; Dougherty deposition at 13, 46; Garand deposition at 8-9.

[183] See Moscowitz testimony at 76, 181; Dougherty deposition at 21; Garand deposition at 15, 75.

[184] See Pet. Exh. 18 at 1 (Garand report); Pet. Exh. 160 at 3 (Dougherty report).

[185] See Pet. Exh. 18 at 1-2; Pet. Exh. 160 at 3; Garand deposition at 17; Dougherty deposition at 25-26.

as "Ivan," but could not remember his coworker's name.[186] Ivan, Mr. Horn told the interviewers, was a tall but heavy-set man with black hair cut short and a full face. Ivan took pride in his position, and looked down on his Ukrainian comrades who were mere guards; he also drank and caroused in nearby Polish villages.[187] Mr. Moscowitz then decided to find out if Mr. Horn could identify Mr. Demjanjuk as the Ivan he recalled.

Mr. Moscowitz testified that he was concerned that if he were to witness the identification process, he could be called as a witness at the trial.[188] Therefore, despite the small size of Mr. Horn's apartment, Mr. Moscowitz moved away from the living room area,[189] while Messrs. Dougherty and Garand conducted the identification process.[190] Eventually, Mr. Moscowitz became aware that the procedure was complete, and that Mr. Horn had identified the pictures of Mr. Demjanjuk as depicting the man he had called Ivan.[191] Later that day, the three men talked about Mr. Horn's identification,[192] and Mr. Moscowitz believed that it was "a good, valid identification."[193] He conveyed this impression to Mr. Parker when he returned from Germany.[194]

---

[186] Gov't. Exh. 18 at 2; Pet. Exh. 160 at 3; Moscowitz testimony at 79.

[187] Pet. Exh. 18 at 2; Pet. Exh. 160 at 3.

[188] Moscowitz testimony at 183-83, 283.

[189] Id. at 182, 280.

[190] See Moscowitz testimony at 89. Mr. Moscowitz also testified that he does believe that Mr. Garand translated during the identification process. Id. at 281-83.

[191] See Moscowitz testimony at 191-93. The dispute over the procedure is discussed below.

[192] Moscowitz testimony at 101.

[193] Moscowitz testimony at 184-85, 189, 284.

[194] See Parker testimony, vol. I at 24, 42.

Mr. Horn was shown two photospreads: one containing the picture of Mr. Demjanjuk from the Trawniki card, presumably taken in the early 1940s;[195] the other contained Mr. Demjanjuk's visa application photograph, taken about ten years later.[196] At the time, both photospreads consisted of separate photographs.[197] The dispute over the identification process centers on the sequence in which the photospreads were presented to Mr. Horn, and on the visibility of Mr. Demjanjuk's picture from the first photospread while the second set was being shown to Mr. Horn.

Messrs. Garand and Dougherty worked in the Investigations division of the OSI, which required them to submit Reports of Investigations describing their work.[198] In separate reports prepared on November 15, 1979—the day after Mr. Horn's interview—Mr. Garand and Mr. Dougherty gave strikingly similar accounts of the manner in which the photographic parade was conducted, which cast substantial doubts on the identifications and on the credibility of Mr. Horn's subsequent testimony.[199]

According to both men's reports, Mr. Dougherty first presented to Mr. Horn the "Trawniki photospread," which contained photographs of men in uniform. Mr. Horn did not identify Mr. Demjanjuk in this series, but stated that he thought he recognized one of the other men pictured. The first set of photographs was then gathered up (neither report states by whom), and stacked within Mr. Horn's view, with Mr. Demjanjuk's photograph on the top of

---

[195] Pet. Exh. 171.

[196] Pet. Exh. 170.

[197] See Dougherty deposition at 32, 43.

[198] See Sinai deposition at 15-16; Garand deposition at 11; Dougherty deposition at 22.

[199] Pet. Exh. 18 (Garand report); Pet. Exh. 160 (Dougherty report).

the stack facing up. Mr. Dougherty then presented the "visa photospread" to Mr. Horn who studied Mr. Demjanjuk's photograph in this series carefully, and commented that it depicted the same person as Mr. Demjanjuk's photograph in the first series (which was facing Mr. Horn). Mr. Horn studied the visa photograph, and stated that the person depicted resembled the man he had known as Ivan, but that Ivan had more hair. Despite this discrepancy, Mr. Horn concluded after further study that Mr. Demjanjuk's photographs depicted the Ivan of the gas chambers.[200]

In late February, 1980, Norman Moscowitz and John Horrigan, accompanied by Mr. Demjanjuk's lawyers John Martin and Spiros Gonakis, travelled to Germany to record on videotape the depositions of Mr. Horn and of Heinrich Schaeffer.[201] A few days before the deposition of Mr. Horn, which took place on February 26, 1980, Messrs. Moscowitz, Horrigan, and Charig spoke again with Mr. Horn at his apartment in Berlin.[202] Mr. Moscowitz again presented to Mr. Horn the two photospreads,[203] and Mr. Horn stated that Mr. Dem-

---

[200] Pet. Exh. 18 (Garand report); Pet. Exh. 160 (Dougherty report). According to Mr. Dougherty's report, Mr. Horn also stated that the visa photograph more closely resembled the man he knew at Treblinka. Id. at 4.

[201] Mr. Schaeffer was the paymaster at the Trawniki training camp, and authenticated the signatures on the Trawniki card. Mr. Moscowitz conducted the Otto Horn deposition, and Mr. Horrigan conducted that of Mr. Schaeffer. See Horrigan testimony at 321; *United States v. Demjanjuk*, 518 F.Supp. 1362 (N.D.Ohio 1981).

[202] See Moscowitz testimony at 104, 190; Charig deposition at 31-33.

[203] Apparently, between the first interview and the second, someone affixed the photographs to large pieces of paper. See Charig deposition at 40.

janjuk's photographs depicted Ivan.[204]

At the end of the photographic identification in November, 1979, when Mr. Moscowitz had joined the three men again, he testified that he had seen Mr. Horn holding both photographs of Mr. Demjanjuk. According to Mr. Moscowitz, Mr. Horn stated during the second interview that in the first interview he had not seen the first one again after he viewed the second photospread. Mr. Moscowitz thought that his recollection contradicted Mr. Horn's statement:

> So, I said something to the effect don't you remember at the end you were looking at them or something to that effect, or you had them. He became agitated and you know and indignant like I was challenging his recall, his integrity, identifications he made.[205]

Mr. Moscowitz resolved this discrepancy by concluding that Mr. Horn had viewed the pictures together only when he wrote his initials on their reverse sides.[206]

Three days later, on November 26, 1980, the lawyers and Mr. Horn gathered at the United States Mission in Berlin,[207] where an American Armed Forces Network video crew recorded Mr. Horn's deposition.[208] Although the two nearly contemporaneous reports' descriptions of the identification process are harmonious, Mr. Horn

---

[204] See Moscowitz testimony at 104, 191; Charig deposition at 33-34, 37-40.

[205] Moscowitz testimony at 191-92.

[206] Id.

[207] Moscowitz testimony at 84, 91.

[208] See Charig deposition at 32. Mr. Horn's deposition was transcribed at the denaturalization trial, and portions appears at Pet. Exh. 160. Videotapes containing the deposition were also introduced in these proceedings, and are part of the official record.

contradicted them when he denied in his videotaped testimony that he could see the first photospread while viewing the second,[209] and that he had first been shown the visa photospread, and shown the Trawniki photospread second.[210]

Despite his misunderstanding with Mr. Horn a few days earlier, Mr. Moscowitz testified that he believed at the time that the testimony Mr. Horn gave was consistent

---

[209] See Pet. Exh. 190 (videotape deposition of Otto H[illegible]n, as transcribed by the court reporter at the denaturalization trial), at 316:

Q. When you looked at those photographs—this other set—where was this first set of photographs?

A. They had been removed again.

Q. And at this time you were looking at this other set, you could not see this first set?

A. Right.

See also id. at 324:

Q. At the time that you were looking at these photographs now in front of you, Government Exhibit 3 [(the Trawniki photospread)], were you looking at the other set of photographs?

A. No.

Q. Were these photographs anywhere in your view?

A. No. They went back into an envelope and went away.

[210] See id. at 318-19:

Q. I'm going to hand you what has been premarked as Government Exhibit 2, A through H, which includes an envelope and eight photographs in it, each photograph marked with a letter of the alphabet A through H.

(Envelope handed to witness.)

. . .

Q. Mr. Horn, before you put these away, may I ask you if this is the same group of photos which you were shown initially?

A. That is the one that I was first shown—that is the first one. That is the same set.

See also Moscowitz testimony at 90.

with the November, 1979, interview.[211] Mr. Moscowitz testified that he asked Mr. Horn to relate the details of the procedure in order to get him to describe what had taken place.[212]

According to the unanimous testimony in these proceedings, nobody read either Mr. Garand's or Mr. Dougherty's reports of the first interview of Mr. Horn prior to Mr. Demjanjuk's denaturalization trial. Copies of OSI reports were customarily sent to the attorney working on the case,[213] and Mr. Dougherty's report was found with a "buck slip" with a message from Mr. Sinai directing a secretary to make a copy of it and forward it to Mr. Moscowitz.[214] Nevertheless, Mr. Moscowitz testified that although he may have received the reports, he did not recall requesting them,[215] and he did not read them until sometime between the end of the denaturalization trial and his departure from the OSI in the fall of 1982.[216]

Mr. Moscowitz made two arguments supporting his conclusion that he did not read the reports. First, he argued that he would not have felt it necessary to read them because he had been there himself.[217] This argument is partly contradicted, however, by Mr. Moscowitz's testimony that he took pains to ensure that he did not witness the original photographic identification process.[218] Second, he argued that it is unlikely that he read the reports because had he done so, he would have

---

[211] Moscowitz testimony at 194.

[212] Id. at 100.

[213] See Sinai deposition at 17.

[214] Pet. Exh. 160 at 1.

[215] Moscowitz testimony at 186.

[216] Moscowitz testimony at 84-88, 91-93.

[217] See Moscowitz testimony at 196.

[218] See text accompanying footnotes 188-94.

discovered from Mr. Garand's report that Mr. Horn had told them, while describing his unfavorable opinion of the Ukrainian guards at the camp:

> In one instance, when the Treblinka camp was closed down in late 1943 and the Ukrainians were being transferred to Sobibor, escorted by a German officer, the Ukrainians murdered their escort and joined the partisans.[219]

Mr. Moscowitz was concerned at the time about evidence of transfers between the death camps, and argued that he would have asked further questions had he read this statement.

There are three weaknesses to Mr. Moscowitz's second argument. Evidence relating to transfers taking place at the time of the camp's closing, while tending to support Mr. Moscowitz's transfer theory, would nevertheless not be very probative as evidence of such a transfer during Treblinka's operation (the Trawniki card carries an entry showing that Mr. Demjanjuk was posted to Sobibor in March, 1943).[220] In addition, Mr. Garand's report indicates that Mr. Horn's statements regarding the transfer to Sobibor were made prior to the photographic identification procedure; Mr. Moscowitz presumably would have been present for this statement, and would not have to have read it to know of it. Finally, Mr. Horn also stated (according to Mr. Dougherty's report) that the Ivan he knew was present every day from September, 1942, to September, 1943.[221]

Despite the problems with these post hoc arguments, there is no substantial evidence in the record to gainsay the crux of Mr. Moscowitz's testimony—that he did not read

---

[219] See Pet. Exh. 18 at 2.

[220] See Pet. Exh. 84 (Trawniki identification card).

[221] Pet. Exh. 160 at 3.

the reports prior to the denaturalization trial. Moreover, all three participants agree with Mr. Moscowitz that after November 14, 1979, they did not discuss the events of that day or the two reports with one another.[222] One explanation is that although Mr. Moscowitz did not witness the actual identification, he felt that his conversations that day with Messrs. Dougherty and Garand[223] provided him with ample information on the way in which it was conducted.

The other attorneys also deny any knowledge of the reports. George Parker testified that he has no recollection of receiving or reading the reports.[224] John Horrigan testified that he did not see them before Mr. Horn's videotaped deposition,[225] and that he first saw them at the time of the Freedom of Information Act litigation several years later.[226] Mr. Horrigan testified that he did not participate actively in the preparation of Mr. Horn's deposition, because of the division of labor between him and Mr. Moscowitz, and because he and the two men were "just getting together" at the time.[227] Arthur Sinai, to whom the reports were addressed, testified that he has no recollection of reading them, and may have simply glanced at

---

[222] See Moscowitz testimony at 96; Dougherty deposition at 47; Garand deposition at 29, 45.

[223] See Moscowitz testimony at 101.

[224] See Parker testimony, vol. I at 19, 26, 42, 134; id. vol. II at 52.

[225] See Horrigan testimony at 321.

[226] Id. at 326. In 1986, Edward Nishnic, Mr. Demjanjuk's son-in-law, filed a FOIA request with the Department of Justice. The Department's denial of the request led Mr. Nishnic to file a lawsuit against the Department. See *Nishnic v. Department of Justice*, 671 F.Supp. 776 (D.D.C. 1987). See also section II.S.

[227] Id. at 324.

them.[228] Similarly, Allan Ryan, Jr.,[229] Gerald Charig,[230] and Judge Bruce Einhorn[231] each testified that they did not receive or read the reports at the time.

If it is true, as Mr. Ryan observed, that the Trawniki identification card "is the most analyzed document in the 20th century,"[232] then certainly, the events which transpired while Mr. Moscowitz's back was turned comprise the most thoroughly dissected photographic identification of our age, as well. All of the participants in the November, 1979, interview have repeatedly been asked to provide testimony or affidavits regarding the events of that day.

In 1986, George Garand provided an affidavit for use in Mr. Demjanjuk's criminal trial in Israel.[233] According to Mr. Garand's testimony in his deposition in this case, Neal Sher told him to go to the Israeli embassy in Washington, where he had a brief discussion with Israeli officials.[234] Someone prepared an affidavit which he signed, but he did not have the opportunity to view the videotape of Mr. Horn's 1980 deposition, or to review his notes on the meeting prior to signing.[235]

Mr. Garand's 1986 affidavit differed from his 1979 report in several respects: first, the affidavit stated that Mr. Horn said "Das ist er" ("That is he") upon seeing Mr. Demjanjuk's photograph.[236] Mr. Garand's report con-

---

[228] Sinai deposition at 15, 19, 22.

[229] See Ryan testimony at 21.

[230] See Charig deposition at 48.

[231] See Einhorn testimony at 9-10.

[232] Ryan testimony at 148.

[233] See Pet. Exh. 207.

[234] Garand deposition at 31, 36.

[235] Id. at 32, 34-37 (stating that he believed his memory of the events was adequate).

[236] Pet. Exh. 207 at 2; Garand deposition at 38-39.

tains no such quote. Second, Mr. Garand states in the affidavit that the sequence of photospreads was as Mr. Horn testified—first the visa photospread, followed by the Trawniki photospread.[237] Finally, the affidavit suggests that Mr. Demjanjuk's photograph in the first photospread was not visible to him while he viewed the second photospread.[238]

Mr. Dougherty was called upon to provide three separate affidavits (in addition to his testimony in this proceeding). In May, 1986, while on home leave from Beirut, Lebanon, Mr. Dougherty provided an affidavit similar to that signed by Mr. Garand.[239] Like Mr. Garand, Mr. Dougherty did not prepare the affidavit (although he may have described what its contents should be), and did not have access to his notes before signing it.[240] Because of his poor memories of the interview, he was reluctant to sign the affidavit.[241]

The affidavit, like that of Mr. Garand, reversed the order in which the photospreads were shown to Mr. Horn.[242] In addition, also like Mr. Garand's affidavit, Mr. Dougherty's contained a quote which was missing from his report, and indicates that Mr. Horn pointed to Mr. Demjanjuk's photograph and said "Das ist ihm" ("That is him").[243] But this May, 1986, affidavit supports Mr. Dougherty's report's statement that Mr. Horn identified Mr. Demjanjuk's photographs only after comparing them:

---

[237] Pet. Exh. 207 at 1-2; Garand deposition at 41.

[238] See Pet. Exh. 207 at 2; Garand deposition at 39-41.

[239] See Pet. Exh. 205; Dougherty deposition at 57.

[240] See Dougherty deposition at 50, 57.

[241] Id. at 58-59.

[242] Id. at 64-65; Pet. Exh. 205 at 2-3.

[243] Pet. Exh. 205 at 3.

> After closely examining all of the photographs over a short period of time, Mr. Horn asked whether the individual depicted in [the visa photograph] was the same as the individual depicted in [the Trawniki card photograph]. I indicated that it was the same individual without further indicating the identity of the individual depicted. At this point, Mr. Horn identified the individual depicted in the above photographs . . . , stating "Das ist ihm." At that point I asked him, "That is who?," and Mr. Horn responded, "That is Iwan."[244]

The affidavit differs in this respect from the report in that it describes a simultaneous showing of photographs which followed the sequential presentations.[245]

After signing the affidavit in May, there continued to be questions about the interview, and in July, OSI Deputy Director Michael Wolf wrote a memorandum to the file memorializing a July 2, 1986 conversation amongst Mr. Wolf, Mr. Dougherty, and Neal Sher regarding his recollections of the interview of Mr. Horn.[246] Although Mr. Dougherty qualified his statements by saying that his recollection of the details of the events "was not certain," he nevertheless provided additional details.[247]

In December of 1986, Mr. Dougherty held the position of Chief of Security at the beseiged United States Embassy in Beirut, Lebanon.[248] Israeli officials asked him to clarify his previous statements, and he travelled to Nicosia,

---

[244] Pet. Exh. 205 at 3.

[245] Id. at 2.

[246] Pet. Exh. 216 at 1.

[247] Id.

[248] See Dougherty deposition at 118-19.

Cyprus, where he signed a second affidavit.[249] As with the previous affidavit, he did not prepare the affidavit, review his notes or discuss the events with Mr. Garand.[250]

The December, 1986, affidavit differed from the one he signed the previous May in two principal respects. First, Mr. Dougherty's statement in the first affidavit about Mr. Horn's inability to identify a picture in the first photospread was unequivocal:

> Mr. Horn looked at each of these photographs, but was unable to identify any of the individuals depicted therein.[251]

Mr. Dougherty's second affidavit contained a moderated description:

> Mr. HORN looked at each of these photographs, but, to the best of my recollection, failed to make any conclusive, positive identification of anyone. I would like to point out, that though I was posing the questions, Mr. GARAND was translating them into German for Mr. HORN, and receiving his answers in German. As a result, I could have missed some of Mr. HORN's verbal responses to questions concerning this photospread.[252]

Mr. Dougherty provided yet a third affidavit in 1988, in connection with the civil fraud suit in the Northern District of Ohio, *Demjanjuk v. United States*.[253] By then, Mr. Demjanjuk had acquired a copy of Mr. Dougherty's 1979 report. In his affidavit, Mr. Dougherty states that he com-

---

[249] Id. at 54-57, 68-78, 82-86, 118.

[250] Id. at 74-75, 77-78, 83.

[251] Pet. Exh. 205 at 2.

[252] Pet. Exh. 208 at 2. See also Dougherty deposition at 83-86.

[253] No. 88-0864 (N.D.Ohio). See Pet. Exh. 210.

pared the report to his subsequent affidavits and observed the discrepancies. He stated:

> If the affidavits contain any inaccuracies, they are completely accidental and unintentional, resulting from losses of memory during the considerable amount of time that elapsed between the occurrence of the pertinent events and the affidavits' preparation.[254]

There is absolutely nothing in the record to contradict the explanation Mr. Dougherty provided in 1988, or to believe that it does not apply equally to Mr. Garand's statements. In addition, with the exception of Mr. Dougherty's final affidavit, signed approximately a month after Mr. Demjanjuk's conviction in Israel and the apparent exception of Mr. Garand's 1979 report, the evidence relating to the 1979 interview was before the District Court of Jerusalem, and considered by it in its decision.[255]

These subsequent statements shed more light on the fallibility of human memory over time than they do on the state of mind of the participants in the denaturalization, deportation, and extradition cases against Mr. Demjanjuk.

H. The Danilchenko Protocols

In the summer of 1979, Norman Moscowitz and George Parker asked the Soviet Union for several pieces of information. Soviet officials responded in December, 1980, and provided documentary evidence and new statements from

---

[254] Id. at 2. See generally Dougherty deposition at 86-105.

[255] See *Israel v. Demjanjuk*, Criminal Case (Jerusalem) 373/86 at 166-74, 234-37 (D.Ct. Jerusalem), reprinted in Respondent's Appendix at 432, et seq., submitted to the Sixth Circuit Court of Appeals, July 16, 1992. In addition, Mr. Horn also testified before that Court, during a special session it held in Berlin. Id.

several death camp witnesses (the "Danilchenko Protocols").

By the summer of 1979, OSI attorneys George Parker and Norman Moscowitz had several outstanding questions about the evidence in the Demjanjuk case.[256] The prosecution team needed a certified copy of the Trawniki card to be admitted at trial, and Mr. Demjanjuk's defense lawyer, John Martin, had some requests for which the OSI had agreed to act as an official channel.[257] The attorneys wanted to follow up on another lead they had obtained: the Soviet English-language magazine "News From the Ukraine" had carried a story in its September, 1977, issue, entitled "Punishment Will Come."[258] The article cited American press accounts of the Complaint filed against Mr. Demjanjuk, and quoted the testimony of a "colleague," "H. Danylchenko," at a "preliminary inquest" identifying Mr. Demjanjuk as a fellow guard at the Sobibor death camp.[259] Finally, the attorneys wanted to obtain statements regarding Mr. Demjanjuk from the guards whose previous statements they had obtained in the Fedorenko Protocols.[260]

On August 2, 1979, Norman Moscowitz drafted a memorandum incorporating these several requests under his and George Parker's names, and he sent it to the State

---

[256] See Parker testimony, vol. I 193-94.

[257] See section III.A, below.

[258] Resp. Exh. 41.

[259] Id.

[260] See Parker testimony, vol. I at 81-82. Mr. Moscowitz believed that the Soviet officials who had assembled the Fedorenko Protocols had edited the Protocols to include only those statements which related to Fedorenko. He believed that the complete statements might have inculpated Mr. Demjanjuk, as well. See Moscowitz testimony at 22.

Department.[261] The State Department transmitted the request to the Soviet Union on August 7, 1979,[262] and the United States Embassy in Moscow passed on the request on August 14, 1979.[263]

By December of that year, the Demjanjuk prosecution team had become concerned over the Soviet prosecutors' silence regarding the August request. On December 4, 1979, Mr. Moscowitz drafted a second request to be made of the Soviet Union, restating the OSI's August request, and asking if the original Trawniki card could be made available for use at the trial.[264] Mr. Mendelsohn, under whose name Mr. Moscowitz wrote the request, did not review the August request, or the Fedorenko Protocols about which the August memorandum sought additional information,[265] but sent the memorandum on to the State Department. Four days later, the State Department cabled the embassy in Moscow with the request.[266]

---

[261] See Pet. Exh. 66 (memorandum from Moscowitz and Parker to the Department of State).

Messrs. Parker and Moscowitz both testified that despite the presence of Mr. Parker's name on the memorandum, Mr. Moscowitz probably was its author. See Parker testimony at 99; Moscowitz testimony at 17.

[262] See Pet. Exh. 153 (cable from the Secretary of State to the United States Embassy in Moscow, dated August 7, 1979).

[263] See Pet. Exh. 155 (cable from the United States Embassy in Moscow to the Secretary of State, dated August 16, 1979). The request from the embassy was delivered in diplomatic note 1235. See Pet. Exh. 130 (cable from the Secretary of State to the United States Embassy in Moscow, dated December 8, 1979).

[264] Pet. Exh. 129 (memorandum from Mendelsohn to the Department of State (Larry Rivera), dated December 4, 1979); Mendelsohn testimony at 105.

[265] Mendelsohn testimony at 106.

[266] Pet. Exh. 130.

Despite their silence, Soviet officials had not ignored the August, 1979, request for assistance. In October, 1979, they interviewed Mr. Malagon, and showed him Mr. Demjanjuk's photograph.[267] Although Mr. Malagon stated that a man named "Ivan Demedyuk or Ivan Dem'yanyuk" had worked in the Treblinka death camp as a cook,[268] upon being shown a photospread containing Mr. Demjanjuk's picture, Mr. Malagon stated that "[t]he guard to whom he had referred during the questioning and whom he had called by the name of Ivan Demedyuk or Ivan Dem'yanyuk was not among them."[269] In addition, Mr. Malagon stated:

> While at the Treblinka death camp, I met the guard Nikolai Marchenko, who drove a gas chamber van. I do not know where he is at present.[270]

Soviet officials also interviewed Ignat Danilchenko, in November, 1979. In concord with his statements quoted in *News From the Ukraine,* Mr. Danilchenko described Mr. Demjanjuk as a trusted guard at Sobibor, who assisted the SS in collecting Jewish people from surrounding areas and bringing them to the death camp to be murdered, who assisted in the unloading of Jewish people and in guarding them as they approached the gas chambers, and who guarded the barracks housing the gas chamber operators. According to Mr. Danilchenko, he and Mr. Demjanjuk were transferred from Sobibor to Flossenburg, Germany, (where he and Mr. Demjanjuk acquired blood group

---

[267] Pet. Exh. 57 (record of questioning of Malagon by Soviet officials, dated October 2, 1979); Pet. Exh. 58 (record of presentation of photographs for identification to Malagon, dated October 2, 1979); Moscowitz testimony at 211.

[268] Pet. Exh. 57 at 2.

[269] Pet. Exh. 58 at 2.

[270] Pet. Exh. 57, at 2.

tatooes) and thence to Regensburg, Germany. While en route escorting prisoners from Regensburg to Nuremburg, Mr. Danilchenko escaped after suggesting – without success – that Mr. Demjanjuk leave also.[271]

On December 28, 1979, Soviet officials transmitted the new evidence to the U.S. Embassy in Moscow.[272] Apparently, because of a delay in translating the documents, the State Department notified the OSI that it had received them sometime prior to January 24, 1980,[273] and the translations arrived for the Office's use on February 15, 1980.[274]

As with the Fedorenko Protocols, George Parker and Norman Moscowitz were the only government attorneys who received and read the Danilchenko Protocols.[275] Al-

---

[271] Id. at 3-4.

[272] See Resp. Exh. 27 (acknowledging receipt of the Danilchenko Protocols).

[273] See Moscowitz testimony at 107-08 (describing his state of knowledge on that date when he wrote a memorandum to Allan Ryan, prior to his Soviet trip. See Pet. Exh. 69A).

[274] See Pet. Exh. 29, at 2, and 3 (affidavit of George Parker). See also Parker testimony, vol. I at 30-32.

[275] See Einhorn testimony at 25-27 (stating that he was unaware of the Protocols' existence until they were uncovered and ordered to be produced in the *Nishnic* Freedom of Information Act litigation; the Protocols were produced to Israel at that time. Id at 27); Ryan testimony at 11, 28 (stating that he was not involved with the litigation at that detailed a level). Mr. Ryan's claimed ignorance is inconsistent, however, with his writings on the Demjanjuk case, which portray him as actively involved in the analysis of evidence. See Ryan, *Quiet Neighbors* 107 (1984), stating

> I looked at the [Trawniki] card, over and over. There was no doubt that the two photos were of the same man. The man in Cleveland had been trained at Trawniki in 1942. And we had eyewitnesses who would place him at Treblinka. I put the two

though John Horrigan was aware that the OSI had received the Protocols,[276] he neither received nor read them until after the denaturalization trial and the mistrial hearing were over in 1981.[277]

I. Assessment of the Evidence

The foregoing narrative demonstrates that of the attorneys at the OSI, only Mr. Parker and Mr. Moscowitz possessed and read several of the pieces of evidence which are currently at issue, including the Fedorenko Protocols, the Polish Main Commission List (the Wojtzcak Article), and the Danilchenko Protocols. Because the question of intent is critical in this case, however, we must ask and answer the next question: what did the lawyers think these pieces of evidence meant?

The fall of 1979 and the winter of 1980 presented significant challenges to Mr. Parker and Mr. Moscowitz in the development of the Demjanjuk case. Having reached this point in the narrative, it is a useful milestone at which to assess their state of mind. Therefore, I next turn to Mr. Parker's and Mr. Moscowitz's specific understandings of the evidence in the Demjanjuk case, as it developed over the course of their first nine months with the case.

1. The Marchenko Evidence

In the summer or early fall of 1979, George Parker created a bibliography of sources and concordance to the

---

photos side by side and studied them for a long time. You son of a bitch, I thought. We've got you.

Apparently, the Trawniki card, which accompanied the Danilchenko Protocols, arrived at the Office under separate cover.

[276] See Horrigan testimony at 301-02.

[277] Id.

aspects of the Treblinka death camp, "to provide as comprehensive document [sic] as I could of everything that we knew about Treblinka and the sources for that information."[278] Mr. Parker reviewed several sources of information, including books and periodicals, survivor statements, and the Fedorenko Protocols. The notes refer repeatedly to five of the Protocols' subjects: Leleko, Malagon, Korotkikh, Yeger, and Fedorenko.[279]

The notes, which, as Mr. Parker testified, represent the best evidence available of his state of mind at the time,[280] make the following observations about the operators of the gas chambers, and the man known as Ivan the Terrible (including misspellings; note that the superscript numbers in the notes do not refer to footnotes in this Report):[281]

IVAN–NIKOLAI

YW-14 (Ivan – tall, gentle eyes, a sadist
– attacked workers – nailed ears to wall
– whipped workers
– while he laughed
I Rosen A2 – had Polish police sword – cut women
(I)Tur A1 – Knows name of Demjanjuk – it is Ivan
YW-15 – Pushed and hit victims forcing them
(S) Fed 6[2] into chambers
I Rosen A1

[278] Parker testimony, vol. I at 86; see Pet. Exh. 76A (Parker's typed notes).

In Mr. Parker's testimony, vol. I at 79-80, he stated that he believed that he created the notes between June and August, 1979, and did not revise them subsequently. However, the reference in the notes themselves to Suchomel (misspelled "Suchomil") as a source suggest that they were made following the attorneys' trip to Germany and Israel in early September, 1979. See Pet. Exh. 76A at 169.

[279] See Pet. Exh. 76A, passim.

[280] See, for example, Parker testimony, vol. I at 95.

[281] See Pet. Exh. 76A. For a list of the sources corresponding to the abbreviations, see id. at I

YW-16 – Opened exist doors – three bodies out

(S) Leleko 5[1] – Motorists looked through porthole saw victims writhering

(I) Raj. – Ivan called – Ivan Grozni (Ivan the ugly)
– Age 24-25; average height, large ordinary face
– Took care of gas pipe – bring gas
– Hit him once 20 times – kept still

I Rosen (A) – Ivan Grozni (the cruel)
Ivan Grozni (the terrible)

(S) Leleko 4[1] – Leleko – names Nickolay and Marchenko as motorists
Marchenko had sword – cut women's breasts

(S) Fed 6[2] – Ivan
– tall, dark complexion

(I) Helman – 30 years

I Lind (A) – Ivan serviced diesel engine which sent gas into chambers

IVAN'S WEAPON

Cz-News – Rubber club – with steel balls

I Hel – Sabre

(I) Ep G6 – Iron bar, pipe

(I) Lew AZ – Knew UK only by 1st name
* – Ivan and Kolka assigned to generator for electricity
– Also operated engine – emited gas
– Ivan
– 25 years
– frightening stare
– carried metal pipe, stick and whip at various times

(I) Ep G5-6 – Nikoli
– shorter than Ivan
– more slender
– didn't wear uniform

Mr. Parker testified that he had evidence at the time he drafted the notes that there were two "motorists" at the Treblinka gas chambers.[282] This statement is consistent with the notes, which strongly suggest that he believed that there were two operators. For example, this portion of the notes carries the heading: "Ivan-Nikolai."[283] In addition, the final entries, referring to Mr. Epstein's statement, compare Nikolai's characteristics to those of Ivan.[284] Mr. Parker also testified, however, that he was unsure how many motorists there were in total, and their identities.[285]

Several things in the notes themselves suggest that Mr. Parker did not believe that either the Leleko or the Malagon protocols exculpated Mr. Demjanjuk. First, the notes remark that Leleko "names Nickolay and Marchenko as motorists,"[286] but do not contain any clues suggesting that Mr. Parker perceived this information to pose any significant problem in terms of the evidence. Second, and more curiously, although the notes refer to Malagon's protocol in other respects,[287] they do not refer to his description of the gas chambers' operators:

> Near the diesel engines by the gas chambers there worked a guard (wachman) by the name of Marchenko, Nikolay, and wachman Rebeka worked in

---

[282] Parker testimony, vol. I at 88.

[283] Pet. Exh. 76A. See also portion reproduced above.

[284] Id.

[285] See Parker testimony, vol. I at 89:

Q. One [motorist] is Nicholay and various—
A. You are making that distinction.
Q. That is not one you made?
A. I think it is confusing how many there were.

[286] See Pet. Exh. 76A.

[287] See, for example, id. at Bates-stamp page 161, which refers to Malagon's protocol (Pet. Exh. 149F) at Bates-stamp page 147.

> the so-called "infirmary." I remember that Marchenko wore a leather jacket and carried a pistol. These two guards did exterminate prisoners, who else among the guards took part in the extermination of prisoners I find difficult to say.[288]

Mr. Parker testified that after drafting the notes, he probably set the Fedorenko Protocols aside, and did not refer to them again.[289] If true, then Mr. Parker never became fully aware of the first Malagon protocol. The picture which emerges from this interpretation of the notes is that they were drafted, somewhat incompletely, as a guide to the available information, and that they do not represent Mr. Parker's analysis of the evidence. They are akin to a road map to the information on Treblinka and the gas chamber operators. Mr. Parker testified that he ultimately did not associate Marchenko's name with Mr. Demjanjuk's actions.[290]

Unlike Mr. Parker, Mr. Moscowitz knew of and evaluated the Marchenko evidence. During Mr. Demjanjuk's deposition in 1978, and on the visa application he filled out in 1951, Mr. Demjanjuk had stated that his mother's maiden name was "Martschenko."[291] Mr. Moscowitz thought:

> It was too much of a coincidence just to be a coincidence. It was an interesting coincidence just the same way it was a very interesting coincidence that

---

[288] Pet. Exh. 76A at Bates-stamp page 149.

[289] See Parker testimony, vol. I at 93.

[290] See Parker testimony, vol. I at 151.

[291] See Resp. Exh. 68 (collective exhibit containing the visa application). Mr. Demjanjuk later claimed to have forgotten his mother's maiden name. See Resp. Exh. 47 at 4 (responses to government interrogatory 13a); Moscowitz testimony at 209-10, 264-65.

> Demjanjuk in his immigration papers said he was a farmer at Sobibor.[292]

To account for this coincidence and the discrepancies in the identification of the gas chamber operators, Mr. Moscowitz developed the alias theory: that Mr. Demjanjuk had used the name Ivan Marchenko while working at Treblinka. Only one survivor had stated that he knew Mr. Demjanjuk's last name, and this lack of familiarity with the name Demjanjuk appeared to support the alias theory.[293] Mr. Moscowitz also believed that Leleko's reference to Nicholay and Marchenko was ambiguous in light of Malagon's reference to "Nicholay, Marchenko,"[294] and that it was possible that Marchenko was Nicholay's last name. Finally, assuming that an Ivan Marchenko served at the gas chambers, Mr. Moscowitz believed that there were two alternatives: either Marchenko was Ivan the Terrible, or someone else (hypothetically, Mr. Demjanjuk) was Ivan the Terrible and served alongside Ivan Marchenko. Mr. Moscowitz did not believe that there were only two gas chamber operators,[295] and the presence of two other operators – Ivan Marchenko and Nikolai – did not rule out Mr. Demjanjuk's alleged service at the gas chambers, in Mr. Moscowitz's opinion.[296] Nevertheless, he thought it possible that Marchenko was Ivan the Terrible.[297]

---

[292] See Moscowitz testimony at 204-205.

[293] This was Mr. Turowski. See Resp. Exh. 14. See also Moscowitz testimony at 204-05.

[294] Compare Pet. Exh. 149K (the Leleko protocol) with Pet. Exh. 149F (the Malagon protocol).

[295] Moscowitz testimony at 207-08.

[296] See id. at 206.

[297] See Moscowitz testimony at 108. Mr. Moscowitz thus perceived four options:

Of these options, the alias theory appeared to Mr. Moscowitz to be the most promising. He discussed it both with Mr. Horrigan and with Mr. Parker.[298] Mr. Parker felt that the theory was weak, however, in part because he found it implausible that Mr. Demjanjuk would have used two names over the span of a year in two separate *Aktion Reinhard* death camps.[299]

Nevertheless, with the alias theory foremost in his mind, Mr. Moscowitz sought evidence to shed some light on this aspect of the case. As has already been discussed above,[300] in August, 1979, Messrs. Moscowitz and Parker asked the Soviet Union to review the Fedorenko Protocols statements for "information concerning Ivan Demjanjuk's possible activities as a guard at Treblinka and that any of the subjects who are still alive be interviewed."[301] The discrepancies in the evidence motivated this request, in part.[302] No response was forthcoming, however.[303]

Marchenko = Ivan the Terrible = Demjanjuk (alias theory)
Marchenko = Ivan the Terrible ◇ Demjanjuk
Marchenko ◇ Ivan the Terrible = Demjanjuk
Marchenko = Nikolai ◇ Demjanjuk (= Ivan the Terrible)

Mr. Moscowitz at one point said that he had two theories (see id. at 110). The list of four is drawn from his complete testimony.

Mr. Moscowitz eventually concluded (following the receipt of the October, 1979, interview of Malagon), that the fourth listed theory was correct – that Nikolai's last name was Marchenko, and that Demjanjuk was still Ivan the Terrible.

[298] See Horrigan testimony at 315; Parker testimony, vol. I, at 98, 161 (stating that his memory of the alias theory is "vague"). Mr. Moscowitz does not specifically recall discussing the theory with others. Moscowitz testimony at 109.

[299] See Parker testimony, vol. I at 98.

[300] See section II.H.

[301] See Pet. Exh. 66 at 1-2.

[302] See Moscowitz testimony at 207; section II.H.

[303] See Moscowitz testimony at 207.

On the eve of Allan Ryan's trip to the Soviet Union in January, 1980, Mr. Moscowitz wrote a supplemental request to be given to the Soviet officials:

> Please ask the Soviets to check the written statements of the interrogations conducted in relation to the investigation of F.D. Fedorenko and others who were guards at Treblinka for the name of Ivan Marchenko or the Ivan who worked at the gas chambers.[304]

Mr. Ryan never received this request, and did not pass it along to the Soviet officials.[305]

On its face, this document appears to suggest that Mr. Moscowitz harbored strong suspicions that Marchenko was Ivan the Terrible. Mr. Moscowitz denies that he doubted the strength of the survivor's identifications, however.[306] Futhermore, read in light of the testimony of the other attorneys that Mr. Moscowitz believed that the alias theory was possibly accurate, the memorandum was not only an attempt to determine if Marchenko was Ivan the Terrible, it was also an attempt to obtain additional incriminating evidence on Mr. Demjanjuk himself.

In any event, the memorandum never reached its intended recipient, and because the Danilchenko Protocols resolved the ambiguity which Mr. Moscowitz had perceived, he failed to follow this trail. On the day after he drafted the memorandum to Mr. Ryan, the OSI received the translated versions of the Danilchenko Protocols, including the interview Malagon gave in October, 1979.[307] That document provided two clues to the mystery about the gas chamber guards: first, Malagon appeared to identify Marchenko as Nikolai's last name; second, he stated that he knew of someone with a name similar to Mr. Demjanjuk's but he was unable to identify Mr. Demjanjuk's photographs:

---

[304] See Pet. Exh. 221.

[305] Ryan testimony at 8.

[306] See Moscowitz testimony at 119.

[307] See Pet. Exh. 57; section II.H.

> While at the Trelinka death camp, I met the guard Nikolai Marchenko, who drove a gas chamber van.[308] I do not know where he is at present. In the same camp I met the guard Ivan Demedyuk or Ivan Dem'yanyuk (I do not remember his name precisely). This guard was of average height and heavy build, spoke Ukrainian and had light brown hair. His speech was pure; he pronounced everything well. I do not know where he was from, since I did not talk to him about this. While I was at the Treblinka death camp, he worked there as a cook, preparing food for the guards.[309]

This statement settled it for Mr. Moscowitz: Marchenko was Nikolai's last name, and the coincidence of Mr. Demjanjuk's mother's maiden name was just that—a coincidence.[310]

2. **The Sobibor Evidence**

Although the name Marchenko did not give Mr. Parker pause, to him, the evidence was irreconcilable for another reason: some of the evidence placed Mr. Demjanjuk at the Sobibor death camp, and some of it placed him at Treblinka. His conviction that the evidence was inherently contradictory led Mr. Parker, in February, 1981, to suggest to his superiors that the Demjanjuk case be

---

[308] This is most likely a poor translation of "dushehubka," which is the term the Soviet witnesses used to refer to the gas chambers. At an early point in the execution of the Final Solution in Poland (prior to *Aktion Reinhard*), the SS *Einsatzgruppen* experimented with killing their victims in mobile gas chamber vans. See Yitzhak Arad, *Belzec, Sobibor, Treblinka: The Operation Reinhard Death Camps* 10-11 (1987). Although the mobile vans were abandoned in favor of permanent killing facilities, the technology developed—using exhaust gasses to poison the victims—was employed at a larger scale at the death camps. Id.

[309] Pet. Exh 57.

[310] See Moscowitz testimony at 48.

radically altered or dismissed. When he felt that they failed to address his concerns, Mr. Parker decided to leave the OSI.

A. George Parker's "Ethics Memorandum"

George Parker wrote a memorandum on or about February 28, 1980, in which he stated that the evidence that Mr. Demjanjuk was at the Treblinka death camp was in conflict with evidence that he was, instead, a guard at the Sobibor, Poland, death camp. Mr. Parker discussed four options, and concluded that legally and ethically, the OSI should either dismiss the case and refile upon receipt of sufficient evidence relating to Sobibor, or amend the pleadings to add allegations that Mr. Demjanjuk served at Sobibor (and at the Trawniki, Poland, camp which served as a training facility for guards serving at all *Aktion Reinhard* death camps).

On October 8, 1992, George Parker produced to the Department of Justice a copy of a cover letter and accompanying memorandum, both dated February 28, 1980, which he had found in his personal files.[311] The memorandum, entitled "Demjanjuk – A Reappraisal," can be divided into three topical sections. First, the memo describes the history of the Demjanjuk investigation and the framing and filing of the complaint against him.[312] It then turns to Mr. Parker's assessement of the evidence; including a discussion of all of the evidence, and a discussion of flaws he perceived with the evidence placing Mr. Demjanjuk at Treblinka.[313] Finally, it contains Mr. Parker's discussion of four options, and their ethical, tactical, and political consequences.[314]

---

[311] Pet. Exh. 72 (memorandum from Parker to Rockler and Ryan, dated February 28, 1980).

[312] Id. at 2-3.

[313] Id. at 3-4.

[314] Id. at 4-6.

This document is so important to the history of this case that it merits careful scrutiny. However, I must first discuss the authenticity of the memorandum, its distribution, and the meeting which it triggered.

The memorandum's authenticity

I am convinced that the memorandum is authentic. Mr. Parker authenticated the memorandum, and testified that he wrote it within a week of the date in its header.[315] Apart from unresolved questions about the memorandum's distribution and the meeting which the document triggered, there are no serious disputes about the memorandum's authenticity.[316]

Mr. Parker's testimony is also supported by his coworker's contemporaneous knowledge of his concerns. Arthur Sinai, Deputy Director for Investigations, testified that he knew that Mr. Parker was bothered by the dispute in the evidence. Although Mr. Parker testified that he did not give a copy of the memorandum to Mr. Sinai,[317] Mr. Sinai recalls reading a document discussing discrepancies in the evidence:

> Q. During the time that you were at OSI, did you have occasion to read that document?
> A. I don't recall. I read – I have a vague recollection of reading something regarding – you know – by George Parker, regarding the case.
> Q. All right. What is your recollection? Can you be more specific, regarding what case, first of all?
> A. Regarding Demjanjuk.

---

[315] Parker testimony, vol. I at 23.

[316] See, for example, Ryan deposition at 138 (stating that "I assume Parker wrote this. My point is that he never sent it to me.")

[317] See Parker testimony, vol. I at 66-67.

> Q. All right. Can you tell me what – be a little more specific as to what your recollection is that you read?
> A. I recall reading something that raised the question of being at Sobibor, versus being at Treblinka.[318]

Mr. Sinai also recalls "office talk" regarding the same conflict in the evidence.[319] Contemporaneous discussions of these issues supports the conclusion that Mr. Parker wrote the memo as he testified.

Mr. Parker also testified that he had discussed his concerns with a coworker, Kathleen Coleman. According to Mr. Parker, he described his concerns over the evidentiary problems with the case, and she advised him to write a memorandum to his superiors.[320] Ms. Coleman testified in her deposition that she recalled discussing the Demjanjuk case with Mr. Parker once, in another person's office, and that they talked about evidentiary issues. She did not remember whether she advised him to write a memorandum to his superiors.[321] Her testimony does not conflict with that of Mr. Parker, however, and supports his assertion that he had developed concerns with the case in the late autumn of 1979, or the early winter of 1980.

Finally, Mr. Parker's colleague on the case, Norman Moscowitz, recalls Mr. Parker's concerns at approxi-

---

[318] Sinai deposition at 35-36. Although Mr. Sinai testified that he doubts that he read the February 28, 1980, document because he did not recall its discussion of ethical considerations, this is not persuasive. See id. The memorandum describes Mr. Parker's ethical concerns, but focuses on the problems he perceived with the evidence.

[319] Id. at 38-40. Mr. Parker testified that Mr. Sinai approached him and told him that his superiors did not understand why he was leaving the Office to return to private practice. Parker testimony, vol. I at 66-67.

[320] Parker testimony, vol. I at 58-59.

[321] See Coleman deposition at 8-20, 22.

mately that time.[322] Mr. Parker testified that following the two men's interview of Chil Rajchman at the Statler Hilton Hotel in New York City in March, 1980, Mr. Moscowitz turned to him and said, "Do you feel any better about this identification at this point."[323] Mr. Moscowitz, although ignorant of the magnitude of Mr. Parker's misgivings,[324] nevertheless was aware that Mr. Parker had concerns about the case.[325] Indeed, Mr. Moscowitz recalls feeling after the Rajchman interview that "this should certainly satisfy George, whatever his concerns were."[326]

The memorandum's distribution

The testimony regarding the distribution of the memorandum is in conflict. George Parker testified that, as indicated in the "To:" field of the memorandum's header, he distributed it to Walter Rockler and Allan Ryan.[327] He was less certain that Norman Moscowitz saw the memorandum.[328] Mr. Rockler did not recall receiving

---

[322] See also the discussion below, regarding Mr. Moscowitz's recollections of meeting with Messrs. Parker, Rockler, and Ryan.

[323] Parker testimony, vol. I at 27.

[324] He was probably ignorant because he never read the memorandum. See discussion below.

[325] Moscowitz testimony at 253-54.

[326] Id. Mr. Moscowitz does not recall saying this to Mr. Parker, but, given Mr. Parker's memory, Mr. Moscowitz almost certainly did make this statement.

[327] See Parker testimony, vol. I at 23, 65, and 151.

[328] Id. at 65 (stating that "I am not certain it was ever given to Mr. Moscowitz"), and 151 (stating that "[t]o the best of my knowledge Norman Moscowitz might have gotten a copy").

There is no evidence that other OSI attorneys received the memorandum, and several deny having seen it while there. See Horrigan testimony at 297-98, and 338; Einhorn testimony at 8-9; Sher deposition at 55.

the memorandum.[329] Mr. Moscowitz testified that he did not receive it.[330] Mr. Ryan reasoned that he could not have received it:

> Q: . . . Your unequivocal testimony is that you never saw it, is that right?
> A. My testimony, Mr. Tigar, is not that I don't remember seeing this or not. My testimony is that had I seen this at the time or about the time it was written it would have made a very strong impression on me from a number of different perspectives and I would have done something about it.[331]

On cross-examination, Mr. Ryan explained that had he seen the memorandum in 1980, he would have objected to Mr. Parker's statement that the prosecution team could be comforted that "we may have the right man for the wrong act";[332] and that he would have "set [Mr. Parker] straight" with regards to his reference to political considerations,[333] in addition to other objections.

The meeting

The testimony is less contradictory with regard to the attorneys' attendance at a meeting held to discuss Mr. Parker's memorandum. Mr. Parker testified that he, Mr. Rockler, Mr. Ryan, and Mr. Moscowitz all met in early March, 1980, shortly after Mr. Moscowitz returned from a

---

[329] Rockler deposition at 32-33.

[330] Moscowitz testimony at 124-25, 237-38.

[331] Ryan testimony at 4-5.

[332] Ryan testimony at 137-138 (stating that "there is no such thing as have the right man for the wrong act or the wrong man for the right act. You have the right man for the right act or nothing."); See Pet. Exh. 72, at 4.

[333] Ryan testimony at 139; See Pet. Exh. 72, at 5, paragraph "C." See also section II.D.

trip to Germany with Mr. Horrigan to interview witnesses.[334] According to Mr. Parker, the meeting was brief—between ten and twenty-five minutes long.[335] Mr. Parker recalls the meeting in detail:

> Q. Can you remember who said what?
> A. I remember two questions. I remember Mr. Rockler asking me, if you are right hypothetically—George, if you are right, that he may—it is irreconcilable and in fact he was at Sobibor, is he still subject to denatralization under the law? My answer was yes, he was.
>
> Q. What else can you remember?
> A. I remember Mr. Rockler asking Mr. Moscowitz whether he agreed with me that the evidence was irreconcilable. Mr. Moscowitz said, no, he did not agree, it was contradictory.
>
> Q. Do you remember Mr. Ryan saying anything?
> A. I remember Mr. Ryan saying nothing.
>
> Q. I know you have said this before. Other than answering those questions, the question from Mr. Rockler, do you remember saying anything?
> A. Nothing other than what I just described to you.[336]

Mr. Rockler recalls a meeting in late February or early March, which he, Mr. Ryan, and "one or two younger lawyers" attended.[337] The topic of the meeting was whether the pleadings in the Demjanjuk case should be amended in light of contradictions between the evidence,

---

[334] See Parker testimony, vol. I at 23-26. Mr. Moscowitz's trip resulted in the videotape deposition of Otto Horn which was admitted in the denaturalization trial. Id. See also section II.G.4.

[335] See Parker testimony, vol. I at 59-60, and 170.

[336] Parker testimony, vol. I at 60. See also id., vol. I at 64-65.

[337] Rockler deposition at 35.

which placed Mr. Demjanjuk alternatively at Sobibor or Treblinka.[338] Mr. Rockler recalls that the meeting lasted an hour and a half,[339] and does not remember discussing Mr. Parker's ethical concerns.[340]

Mr. Moscowitz also recalls meetings he attended with the three other men, but does not recall a meeting specifically to discuss the memorandum.[341] He does not recall any meeting at which ethical concerns of the type Mr. Parker raised in his memorandum were discussed.[342]

Mr. Ryan does not recall a meeting as Mr. Parker described in his testimony. Mr. Ryan produced copies of his appointment book for the relevant period, and the sole reference to a meeting with Mr. Parker was on January 16, 1980, six weeks before Mr. Parker wrote the memorandum, and one week after Mr. Ryan arrived at the OSI.[343] Furthermore, Mr. Ryan did not recall Mr. Parker ever expressing doubts about the evidence in the Demjanjuk case, and he testified that he did not feel unfamiliar or unqualified to speak and would not have remained silent at the meeting.[344]

Although each of these witnesses testified credibly, I do not harbor any substantial doubt that Mr. Parker's recollections of these events are largely accurate. With regard to the memorandum's distribution, Mr. Parker's testimony is not in conflict with that of Mr. Rockler, who does

---

[338] See Rockler deposition at 35-37, 42-47.

[339] Rockler deposition at 54-55.

[340] Id. at 39.

[341] Moscowitz testimony at 125.

[342] Id. at 125, 287-88.

[343] Pet. Exh. 236 (Ryan's appointment book excerpts); Ryan deposition at 4, 142-43, 176-78. See also section I.B.

[344] Ryan deposition at 177.

not recall receiving the memorandum but did not rule it out. Nor is Mr. Parker in conflict with his former colleague, Mr. Moscowitz. Mr. Parker did not recall giving Mr. Moscowitz a copy, and Mr. Moscowitz testified that he did not receive it. Given both men's credible demeanor, it follows that Mr. Parker did not, in fact, give Mr. Moscowitz a copy of the memorandum.

Mr. Ryan's testimony on this point is reconcilable in several ways with the apparently contradictory testimony of Mr. Parker. First, a clerical error may have been responsible: Mr. Parker testified that he distributed it to Mr. Ryan; he did not say that he placed it in Mr. Ryan's hands. It is possible that the copy was misplaced en route to Mr. Ryan. Second, Mr. Ryan may have received the memorandum, but may not have read it for some reason. Finally, Mr. Ryan's assertions that had he seen it, he would have reacted, and that he would not have felt unqualified to speak at the meeting are reconstructions of what his state of mind would have been in hypothetical situations thirteen years ago. For any one of these reasons, Mr. Ryan's testimony should be taken with a grain of salt.[345]

Although the documentary evidence is slight, and memories are weak, the following scenario strikes me as likely explanation of the events surrounding the memorandum and the meeting: Mr. Parker wrote and distributed the memorandum in the last week of February. Mr. Rockler read the memorandum, and discerned that there were two threshold questions: first, was there a discrepancy in the evidence which was irreconcilable?; second,

---

[345] Another alternative is that Mr. Rockler, who probably called the meeting (see below), did so before Mr. Ryan could read the memorandum. After the meeting, Mr. Ryan may have felt that the matter was resolved, and discarded the memorandum without reading it.

would the evidence under either interpretation be insufficient under the relevant legal standard? Mr. Rockler determined that only if the answer to both questions was affirmative would the situation pose an ethical dilemma. With these threshold questions in mind, he invited the three men to meet with him,[346] posed his question (as Mr. Parker recalls), and having determined that the answer to both was negative, he adjourned the meeting.

The significance of the meeting for each man accounts for their differing recollections. For Messrs. Rockler, Ryan, and Moscowitz, the meeting would have been a brief interruption in their day.[347] Mr. Rockler decided that the central issue was evidentiary, and not ethical, and that is the context in which his memory places the events. In all likelihood, Messrs. Ryan and Moscowitz never read the memorandum, and, therefore, knew nothing of the ethical arguments it posed, but which were not raised at the meeting. For Mr. Parker, however, the meeting was a pivotal event: his substantial ethical concerns had not been resolved (or even discussed), and for this and other reasons, Mr. Parker decided to leave the Office for private practice in New York.[348] It is not surprising, therefore, that Mr. Parker's recollection of the meeting is much more detailed than that of his colleagues.

---

[346] The brevity of the meeting, and the fact that Mr. Rockler directed, and probably called it, account for the absence of an entry for the meeting on Mr. Ryan's appointment book.

[347] It is unclear why Mr. Rockler recalls that the meeting lasted an hour and a half. For reasons discussed presently, Mr. Parker's recollection of the particulars of the meeting is the most credible.

[348] Parker testimony at 61-64, 147. See section I.B. for a discussion of Mr. Parker's departure.

The memorandum's content

The memorandum is primarily important not for who saw it, nor for who discussed it, however, but for what it says about the state of mind of the OSI attorneys (and in particular, Mr. Parker) working on the Demjanjuk case at a critical time in the case's development. It merits careful scrutiny.

After discussing the investigation of the case—including its origins as an investigation that Mr. Demjanjuk served at Sobibor, Mr. Parker analyzes the admissible evidence against him with respect to all three camps, starting with the training camp, Trawniki:

> If this case were to be tried in April, 1980, we can reasonably expect to present the following evidence to prove that Demjanjuk was trained as a guard by the Germans: (1) he was a Russian soldier attached to the artillery, who received a back injury and was captured by the Germans at a battle at Kerch on the Crimea in either November 1941 or May 1942. (2) he was placed in two successive POW camps, Rovno and Chelm where living conditions were horrible and from which the Germans selected POW's with mechanical skills and inoffensive political backgrounds to train as camp guards. (3) He was at Trawniki as indicated by the card received by the Soviets. At Trawniki the Germans trained Ukrainian POW's to be ghetto and extermination camp guards. The POWs did not knowingly volunteer for either the training camp nor their ultimate camp assignments. The signatures of the German officials, Teufel and Streibel, whose names appear on the cards will be authenticated by Schaefer, a volkdeutsche, who worked at the camp. Unfortunately, Schaefer cannot say he has ever seen this type of card. Consequently, the judge may not even

> admit the card into evidence, but he probably will. But since we cannot trace its history for the last 38 years, we cannot expect the court to extend too much weight to the card.[349]

Mr. Parker next turned to the evidence placing Mr. Demjanjuk at Sobibor:

> We can reasonable [sic] expect to present the following direct evidence that Demjanjuk was at Sobibor: the Trawniki card which is fraught with problems described above. Danilchenko's statement is obviously hearsay and is in all probability not even a literal statement. Demjanjuk's testimony that his blood type was marked on his arm is of little significance without the admission of Danilchenko's testimony.[350]

Mr. Parker then turned to the evidence placing Mr. Demjanjuk at Treblinka:

> Finally, we can reasonably expect to present the following evidence that Demjanjuk was at Treblinka: (1) the testimony of two or three Israeli's and one German, each of whom was initially interviewed by the Israeli police. Each will identify the defendant as Ivan the Ukrainian who worked at the gas chambers and brutally beat Jews solely on the basis of the defendant's visa photograph taken in 1952. They will state that the photograph bears a striking resemblance to Ivan—that like the photo he had protruding ears, short receding hairline, full face, broad shoulders and stood about 175 cm (5′ 8″). The three Israeli witnesses are unwilling to say with absolute certainty that the photo is of Ivan. These three individuals also identified Fedorenko and two of them testified at his trial.

---

[349] Pet. Exh. 72 at 3.

[350] Id.

> (2) The testimony of Otto Horn, a German officer who worked near the gas chambers, who like the Israelis can identify Demjanjuk only by his photographs. (3) The testimony of one American survivor whose identification is weaker that those of the others. (4) Possibly, the testimony of a survivor living outside the U.S. and Israel who was initially interviewed by American consulate officials. (Now being done).[351]

Like the Sobibor evidence, this evidence, too, was fraught with problems:

> The reliability of the Treblinka evidence is flawed by the following: (1) Its [sic] premised exclusively on the basis of photographs which may at best closely resemble to facial features of the man witnesses knew. Survivors are more likely to recognize the photograph taken in 1952 that that taken in 1942 at Trawniki as the man they knew at Treblinka. (2) Several Treblinka survivors, including SS officer Suchomil [sic], insist that Ivan rarely if ever left the camp. Indeed, Suchomil insists that Ivan was at the camp continuously from July 1942 until November 1943, at which time he departed along with Kurt Franz, Suchomil and others for Trieste, for the purpose of establishing other camps.[352] (3) The witnesses fairly consistently, with the exception of Franz, say that Ivan was one of the taller Ukrainians, about 175 cm. whereas Demjanjuk is now and was at the time he applied to enter the U.S. closer to 6'1". (4) The conflicting Sobibor, Flossenburg, and Regensburg statement

---

[351] Id. at 4.

[352] This may be what Suchomel told Mr. Parker. Other sources, however, state that the SS personnel at Treblinka were dispatched to Trieste to assist in suppressing the partisans of Yugoslavia. See Alexander Donat, ed., *The Death Camp Treblinka* 277 (1979).

> from Danilchenko which cannot be reconciled with information supplied by Suchomil and others.[353]

Mr. Parker's central complaint was that the evidence was irreconcilable. Moreover, although he credited the documentary evidence placing Mr. Demjanjuk at Sobibor, and Danilchenko's statement which supported it, he recognized that the Rules of Evidence placed the case on precarious ground:

> We have little admissible evidence that defendant was at Sobibor yet serious doubts as to whether he was at Treblinka. Even if we may be comforted that we may have the right man for the wrong act, the ethical cannons [sic] probably require us to alter our present position.[354]

The most striking aspect of the memorandum is its complete silence regarding the references to a man named Marchenko at the gas chambers. If Mr. Parker had suspicions that the Leleko and Malagon statements' references to Marchenko were relevant to the question of Mr. Demjanjuk's alleged service at Treblinka, he would have mentioned those suspicions in his analysis of the flaws with the Treblinka evidence. The tone of the memorandum is persuasive, and had Mr. Parker possessed such a strong argument against proceeding with the Treblinka allegation, he would have used this opportunity to discuss it with his superiors. He certainly never expected to see this document fall into Mr. Demjanjuk's hands, and so he had no incentive to withhold this information, had he perceived its importance.

---

[353] Pet. Exh. 72 at 4.

[354] Id.

B. Norman Moscowitz and the Transfer Theory

Norman Moscowitz perceived the same contradictions in the evidence placing Mr. Demjanjuk at the two camps, but attempted to bridge the gap by developing evidence suggesting that Mr. Demjanjuk could have been transferred between camps. Several pieces of evidence provided the basis for the transfer theory. Fedorenko, in his 1975 statement, had mentioned that guards had been transferred to the Sobibor death camp.[355] In addition, the survivor Elijahu Rosenberg stated that he saw Ivan at the camp less frequently during the spring of 1943.[356] Over the course of the fall of 1979 and the early winter of 1980, both attorneys actively pursued the transfer theory:

> Q. Let me put it this way. Do you remember whether or not after you raised your concerns whether or not there was any investigation as to whether or not guards were transferred among the Nazi death camps—
>
> A. I think it was an ongoing issue. It wasn't just when I sent the memo. Our concern for some time had been whether there could have been a transfer back and forth.
>
> My conclusion again in February was that there wasn't. But that didn't mean other people didn't continue to search and believe there could have been a transferring.
>
> Yes, there was an ongoing effort to see if there could be a transfer between these camps.[357]

In the end, although Mr. Moscowitz testified that he had substantial evidence placing Ivan the Terrible at

---

[355] See Pet. Exh. 149T.

[356] Pet. Exh. 58A; See Moscowitz testimony at 130.

[357] Parker testimony, vol. I at 167-68.

Treblinka continuously,[358] he concluded that Mr. Demjanjuk had served at both camps.[359] At the denaturalization trial, Mr. Moscowitz presented several pieces of evidence that transfers took place.[360] The government's expert, Wolfgang Sheffler, testified that transfers took place,[361] as did Heinrich Schaefer, the volksdeutsche paymaster of Trawniki.[362] In addition, the government pointed to the entry on the Trawniki card showing Mr. Demjanjuk's posting to Sobibor in March, 1943, as evidence that even at that late date, guards were being dispatched to the extermination camps.[363] Judge Battisti concluded, however, that the transfer theory was too speculative, and found it unnecessary to rule on the Sobibor allegation.[364]

---

[358] See Moscowitz testimony at 130.

[359] Id. at 242.

[360] See Moscowitz testimony at 129-30.

[361] See Pet. Exh. 188 (trial transcript of Dr. Sheffler's testimony).

[362] See Pet. Exh. 189A (Schaefer deposition).

[363] See Pet. Exh. 84 (Trawniki identification card).

[364] See *United States v. Demjanjuk*, 518 F.Supp. 1362, 1376 n. 31 (N.D.Ohio 1981), stating:

> Because the Court has found that defendant was present at both Trawniki and Treblinka, it is not necessary to determine whether defendant was ever present at the concentration camp of Sobibor, Poland. Government's Exhibit 6 [(the Trawniki card)] shows that the defendant was detailed to Sobibor on March 27, 1943, but the circumstances and duration of this transfer are unknown. There was no eyewitness testimony presented that defendant served at Sobibor, although defendant stated on his application for immigration visa (Government's Exhibit 21) that he was in Sobibor from 1934-1943, working as a farmer. Defendant now admits that he lied on his visa application and claims that he was never at Sobibor during this period.

As I mentioned above, the memorandum and the meeting represented a watershed moment in Mr. Parker's service as an OSI attorney. Although he had other misgivings about continuing with the Department of Justice,[365] the Office's decision to proceed with the Demjanjuk case as it was then pleaded impelled him to begin the process of leaving the Office:

> Q. What did you do about Mr. Rockler's decision?
> A. I did two things.
> Q. What were they, sir?
> A. I continued to work on the case in a professional manner, not sabotaging it, working the best I could under the decision that had been made and I also decided that I was going to leave the office.[366]

It appears that subsequent to this decision, Mr. Parker began to focus on the immigration portion of the Demjanjuk case.[367]

---

[365] See Parker testimony at 62-63 (stating that he had decided not to make a career out of government service; that he was planning to return to a legal services position that would pay less money, and that this adjustment would be more difficult to make the longer he stayed with OSI; and that the departure of his friend and mentor, Martin Mendelsohn, resulted in his no longer participating in the "inner circle" of decisionmaking in the office).

[366] Parker testimony, vol. I at 61-62.

[367] Parker testimony, vol. II at 15; Pet. Exh. 87 (memorandum from Parker to Moscowitz and Horrigan discussing witnesses, replying to Moscowitz's memorandum dated May 16, 1980); Pet. Exh. 177 at 2 (memorandum from Parker to Ryan dated June 13, 1980).

Mr. Ryan attempted to blunt the effect of Mr. Parker's memorandum by stating that the subsequent memoranda which Mr. Parker wrote do not raise the ethical questions posed by his February, 1980, memorandum. See Pet. Exhs. 87, 177.

This misses the point, I think: Mr. Parker took his concerns to his superiors, and learned that they did not concur with him. His subse-

Mr. Parker's misgiving do not remotely suggest that Mr. Moscowitz's continued prosecution of the Demjanjuk case was unethical. As noted above, it is unlikely that Mr. Moscowitz ever learned that Mr. Parker harbored ethical concerns, and in Mr. Moscowitz's own independent judgment, the continued prosecution posed no ethical dilemma.[368]

Although the memorandum discusses the ethical responsibilities facing the attorneys, it is in no way a "smoking gun," and provides no evidence of the breach of any ethical duty. To the contrary, the ethics memorandum, and the testimony regarding the events it triggered, is strong proof that Mr. Parker was, in 1980, a conscientious and thoughtful lawyer who took his ethical obligations seriously, and deeply considered the implications of his actions.[369]

---

quent behavior was premised on his respect for the independent judgment of his colleagues, and for the finality of their decision. His subsequent writings deal primarily with immigration-related witnesses and his assessment of Mr. Demjanjuk's defense. They do not discuss the prosecution's case, and are wholly consistent, therefore, with the opinions he expressed in his February memorandum, and his testimony that he continued to work professionally, without sabotaging the case with which his colleagues were proceeding.

[368] See Moscowitz testimony at 243.

[369] As discussed above, the scenario I have constructed to explain the course of the meeting called to discuss the memorandum is based largely on circumstantial evidence and Mr. Parker's own testimony. To the extent that it is an accurate depiction of the events, it calls into question Mr. Rockler's handling of the case, because although his resolution of the matter was expeditious, it was also insensitive to Mr. Parker's concerns. To proceed in such a case so long as there is one attorney who believes that the evidence can be reconciled is to abdicate the responsibility and judgment which the supervisory position demands. Moreover, it places the disagreeing attorney on the horns of the dilemma which Mr. Parker faced: either to decline to continue working on the case or agree to subordinate one's convictions.

Although Mr. Parker's subsequent departure did not make the prosecution unethical, it did deprive the prosecution team of an experienced attorney whose insights – had they been heeded – would have changed the course of the case dramatically. The principal distinction between Mr. Parker's and Mr. Moscowitz's approaches to the evidence in the case was in their interpretation of the eyewitness testimony. Mr. Parker viewed survivor identifications as inherently problematic, given the long period of time which had elapsed since the events at Treblinka, and the uncertainties surrounding the identification procedures. Mr. Parker formed this opinion, in part, on his experience in the *Laipenieks* case, in which survivors of Gestapo persecution had identified the wrong suspect.[370] Mr. Moscowitz had no such experience (in fact, Mr. Moscowitz had worked as a lawyer for only two years before coming to the OSI). Although the survivors were credible and entirely truthful, Mr. Parker's experience told him that the dangers of this evidence had nothing to do with the witnesses' sincerity and demeanor, and could not be avoided by determining those characteristics of a given witness.

---

[370] See Parker testimony, vol. I at 149-50. Mr. Parker testified that the OSI dropped the prosecution. They apparently resumed it. See *Laipenieks v. Immigration and Naturalization Service*, 750 F.2d 1427 (9th Cir. 1985).

In addition to the Laipenieks case, Mr. Parker's reticence about eyewitness identifications was borne out in several cases to which reference was made in these proceedings. Chajm Sztaejer, a Treblinka survivor living in Australia, had identified Liudas Kairys as Ivan the Terrible in 1980. This identification certainly was erroneous; Mr. Kairys had been a guard at the Treblinka labor camp, and had not served at the Treblinka death camp. Similarly, as has already been discussed, the survivor identifications in the case of *United States v. Walus* were almost certainly in error.

J. The Dorofeev Protocols

In March, 1980, the OSI again requested additional information from the Soviet Union.[371] In a memorandum written March 5, 1980, Arthur Sinai asked the State Department to ask the Soviets if Ivchenko (whose protocol was part of the Danilchenko Protocols) if he would testify in the United States.[372] The Office also asked for additional statements from five Soviets who had served at Trawniki, for information on transfers between death camps, and for the loan of the original Trawniki documents.[373] The State Department cabled this request to the United States Embassy in Moscow, which passed it on in a diplomatic note to the Soviets.[374]

The Soviets conducted the interviews in September, 1980, and asked the five named individuals about Trawniki, Mr. Demjanjuk, and transfers between the death camps. On December 4, 1980, the Soviets responded that Ivchenko and Dorofeev were unable to travel because of medical reasons, but that they would be available to testify at by deposition in the U.S.S.R.[375] Accompanying

---

[371] This request came on or about the time of the meeting held to discuss Mr. Parker's "ethics memorandum" of a week earlier. The timing suggests that the meeting or memorandum prompted the request's initiator (probably Mr. Moscowitz) to seek additional evidence supporting the alternative grounds for Mr. Demjanjuk's denaturalization—service at Sobibor and Trawniki. As will be explained, the request focuses on these allegations.

[372] See Pet. Exh. 173.

[373] Id.

[374] See Pet. Exh. 174 (corrected cable to the United States Embassy, dated March 7, 1980); Pet. Exh. 176 (copy of diplomatic Note 356, dated March 10, 1980, and comprising the request to the Soviet officials).

[375] Pet. Exh. 182.

the note were a list and the protocols of the five interviews.[376]

The protocols, which describe interviews with Messrs. Dorofeev, Orlovsky, Kharkovsky, Kolgushkin, and Savenko, provided little new information. Of the five, only Mr. Dorofeev recalled the name Demjanjuk. Although he selected two of Mr. Demjanjuk's photographs in three-photograph photospreads, he also qualified his identification of both photographs by stating that his recollection of the features of the guard in question was poor.[377] None of the other witnesses recognized Mr. Demjanjuk's name, but three of the five stated that transfers were routed through Trawniki, which served as a distribution center.[378]

Norman Moscowitz testified that the OSI received the Dorofeev Protocols in January, 1981.[379] With trial scheduled for early February, the Protocols arrived too late for the prosecution to obtain depositions, and so Mr. Moscowitz filed them away.[380]

---

[376] The United States Embassy informed the State Department of the note's receipt on December 9, 1980. See Pet. Exh. 185 (cable from United States Embassy, Moscow, to the State Department).

[377] See Pet. Exh. 46.

[378] See Pet. Exh. 53 (protocol of Mr. Kharkovsky, stating that Trawniki was a distribution center for transfers); Pet. Exh. 54 (protocol of Mr. Kolgushkin, making similar statement); Pet. Exh. 59 (protocol of Orlovsky, making similar statement, and that he himself had been transferred from the Belzec *Aktion Reinhard* death camp to the Auschwitz concentration/death camp). Messrs. Savenko and Dorofeev (who were interviewed first) stated that they did not know if transfers were made between Treblinka and Sobibor. See Pet. Exh. 61 (protocol of Mr. Savenko); Pet. Exh. 45 (protocol of Mr. Dorofeev).

[379] See Moscowitz testimony at 229.

[380] See Pet. Exh. 37 (letter from Moscowitz to defense counsel John Martin, dated March 27, 1981). The government's production of these protocols to the defense following trial was the grounds for a mistrial motion. See section II.M.

K. Amending the Complaint

Shortly before trial, the government moved to amend its complaint to allege that the Mr. Demjanjuk's service at the Trawniki and Sobibor camps, and his participation in the German military in 1944-45 constituted independent grounds for denaturalization.[381] The government argued that Mr. Demjanjuk had consented to litigate the Sobibor and Trawniki issues, that his statement of the issues in an earlier motion evinced this understanding,[382] and that Mr. Demjanjuk would suffer no prejudice on account of the

---

[381] See Resp. Exh. 5 (motion to amend the complaint); [resp ex 6] (amended complaint).

Allan, Ryan, Jr., subsequently gave a speech in which he stated that "I did not feel on the basis of the evidence that we had that we could responsibly charge him with crimes [at Sobibor]." See Pet. Exh. 238, at 14 (unnumbered page of a draft of the speech). This statement was literally true in two senses: first, the denaturalization complaint was not a criminal indictment; second, although the amended complaint alleged that Mr. Demjanjuk "assisted in persecution of civilians because of their religious or national origin" while at Treblinka (see Resp. Exh. 6 at ¶ 16), it accused Mr. Demjanjuk of "cruel, inhumane and bestial treatment of Jewish prisoners" only in conncection with his alleged service at Treblinka. See id. at ¶¶ 12, 17.

[382] See denaturalization docket no. 45 (Supplemental Brief Regarding Defendant's Motion for a Protective Order, filed December 10, 1979). The brief stated:

> The government rests its case upon the contention that the defendant, during World War II, was present and participated in events which occurred at three locations in Poland. The first location at issue is the Travniki Training Center.
>
> The government contends that the defendant received training as a Ukrainian guard for the German S.S. at Travniki. . . . The defendant has steadfastly denied this. . . .
>
> The second focal point is the death camp at Sobibor. Once again, the defendant has steadfastly denied his presence at Sobibor. . . .
>
> The third location at issue is Treblinka. . . .

Id. at 2 (citations omitted).

amendment because he had been aware of, and had undertaken discovery of, the additional allegations. The government asserted that it had intended to amend the pleadings to conform to the evidence pursuant to Fed. R. Civ. Proc. 15(b), but that Mr. Demjanjuk's pretrial brief put them on notice that he had revoked his consent.[383] Mr. Demjanjuk argued that he had not consented to litigate the issues of Sobibor and Trawniki, and that they were merely collateral to the central issue of his alleged service at Treblinka. In the alternative, Mr. Demjanjuk sought an additional sixty days for discovery.[384] Judge Battisti granted the motion to amend on the eve of trial.[385]

The only substantial question about the government's amendment is whether it was offered in good faith, in light of Mr. Parker's memorandum, which stated that:

> so long as we cannot prove with clear and convincing evidence that he was at Sobibor, and do not believe [that] he was at Treblinka, option D [(to amend the complaint to add Trawniki and Sobibor)] is simply a ruse to avoid the ethical problems which beset Option A [(to maintain the status quo)], even if we do not identify him as Ivan the Terrible of Treblinka.[386]

Mr. Demjanjuk argues that the government's amendment constituted such a "ruse." [387] I disagree. The government attorneys possessed good-faith beliefs, based on credible

---

[383] See Resp. Exh. 5.

[384] See denaturalization docket no. 181.

[385] See denaturalization docket no. 186 (minutes of pretrial held February 9, 1981, granting the motion to amend); denaturalization docket no. 198 (memorandum and order granting the motion to amend, dated February 10, 1981).

[387] See Petitioner's Proposed Findings of Fact and Conclusions of Law at 156.

evidence available to them both at the time of Mr. Parker's memorandum and when they moved to amend the complaint, that transfers took place between *Aktion Reinhard* death camps, and that Mr. Demjanjuk had served at both Treblinka and Sobibor.

Although Judge Battisti made no findings about Mr. Demjanjuk's alleged service at Sobibor, there was ample evidence available to support the government's amendment. In addition to the Trawniki card itself, the statement of Dorofeev (which the OSI received in January, 1981), supported the conclusion that Mr. Demjanjuk had served at Trawniki. In addition to the Sobibor notation on the Trawniki card, the government possessed the Danilchenko protocol, which—although inadmissible on hearsay grounds—supported the conclusion that Mr. Demjanjuk had served at Sobibor. Additionally, the government had ample evidence that transfers took place between the death camps, including three of the five Dorofeev Protocols, the Fedorenko 1975 statement,[388] and the testimony of Wolfgang Scheffler, the government's expert witness. There is absolutely no evidence in the record to support the conclusion that Messrs. Moscowitz or Horrigan did not believe in the accuracy and strength of all of the allegations in the amended complaint.

L. The Trial

The denaturalization trial took fourteen days in February and March, 1981.[389] The government's case consisted of four broad themes: the history of the Eastern theatre of World War II and of *Aktion Reinhard*; the Trawniki card; Treblinka-eyewitness identifications; and Mr. Demjanjuk's immigration. Six eyewitnesses who had

---

[388] See Pet. Exh. 149T.

[389] Specifically, the trial took place on February 10, 11, 12, 13, 17, 18, 19, 24, and 25, and March 2, 4, 5, 10 and 11, 1981.

been at Treblinka and who had identified Mr. Demjanjuk's photograph in a photospread testified, including Chil Rajchman, Elijahu Rosenberg, Georg Rajgrodzki, Sonia Lewkowicz, Pinhas Epstein, and Otto Horn.[390]

In response, Mr. Demjanjuk offered: three witnesses who testified about the forced repatriation of displaced persons to the Soviet Union following World War II;[391] five character witnesses (and stipulations regarding thirty-seven others);[392] and his own testimony, which placed him in POW camps throughout the period of Treblinka's operation.[393]

M. The Mistrial Motion

While Judge Battisti pondered his decision, Norman Moscowitz reviewed the Dorofeev Protocols, and decided that it would be better to disclose that the OSI had received them than to remain silent.[394] On March 27, 1981, Mr. Moscowitz wrote the following letter to John Martin, Mr. Demjanjuk's defense counsel:

> Dear John:
>
> Shortly before trial, our office received witness protocols from the U.S.S.R. in connection with this case. While none of the witnesses were at the Sobibor or Treblinka death camps, the protocols do contain further incriminatory information, and support for

---

[390] See *United States v. Demjanjuk*, 518 F.Supp. 1362, 1369-70 (N.D.Ohio 1981).

[391] These were Dr. Michael Pap, Jerome Brentar, and Edward O'Connor. See transcript at 919-61, 967-96, and 1020-59, respectively.

[392] See transcript at 1018.

[393] See id. at 1062-1120.

[394] See Moscowitz testimony at 42.

> the government's case. However, we could not, of course, make use of them at trial and it was too late to obtain either the live or deposition testimony of the Soviet witnesses involved. In the press of preparing for trial, we simply filed the protocols away.
>
> In reviewing my files this week, I came across the protocols. Having re-read them, I think the appropriate course is to inform you of them so that the record of discovery in this case is complete. I am not requesting that they be made part of the trial record.[395]

Mr. Moscowitz listed the names of the witnesses interviewed in the Dorofeev Protocols, but he did not at that time provide the actual statements.[396]

A few weeks later, Mr. Martin received an affidavit of Chaim Sztajer, a Treblinka survivor living in Australia.[397] Mr. Sztajer had failed to identify Mr. Demjanjuk's photograph in a photospread, and the government disclosed this fact to Mr. Demjanjuk.[398] In his affidavit, however, Mr. Sztajer identified the defendant in another denaturalization case tried by Mr. Moscowitz – Liudas Kairys – as Ivan from the gas chambers:[399]

> I recognize the person shown in a photograph published in the 22 August issue of the *Jewish News*, Melbourne. I believe that the person identified in the caption as Liudas Kairys is identical to the man known as "Ivan" who worked as a guard at Treblinka.

---

[395] See Pet. Exh. 37.

[396] See id.

[397] See Pet. Exh. 196 at 2 (brief of Mr. Demjanjuk in support of his motion for a mistrial).

[398] See Pet. Exh. 30, response to question 11(a) (government's first response to Mr. Demjanjuk's fourth set of interrogatories).

[399] See *Kairys v. Immigration and Naturalization Service*, 981 F.2d 937 (7th Cir. 1992).

> During my eleven months at Treblinka, I was in daily contact with Ivan. My main duty was to carry corpses from the gas chamber to open graves. I saw Ivan commit crimes, including murder and preparation of the gas chamber.[400]

Mr. Moscowitz did not disclose this affidavit to Mr. Demjanjuk, nor did he provide Mr. Sztajer's name in response to Mr. Demjanjuk's first interrogatory question, which called for "the name and last known address of every person known to the [government] . . . who claim to have any knowledge of the alleged actions of the defendant."[401]

Mr. Martin filed a motion for a mistrial on Mr. Demjanjuk's behalf, in which he raised three grounds.[402] First, he argued that the government had failed to supplement its interrogatory responses as required under Federal Rule of Civil Procedure 26(e), and that the witnesses were relevant to question of Mr. Demjanjuk's alleged Trawniki service and the authenticity of the Trawniki card. According to Mr. Martin, the government should have produced these names in supplemental responses to interrogatories before trial. Second, he argued that Mr. Moscowitz's letter by itself warranted a mistrial, because it impermissibly suggested to the Court after the close of the evidence that additional incriminatory evidence was available.[403] Finally, Mr. Martin argued that the government failed to comply with its discovery obligations when it did not provide Mr. Sztajer's name in response to the question 1 of the first set

---

[400] See Pet. Exh. 179.

[401] See Pet. Exh. 3 (first set of interrogatories and government's first responses).

[402] See Pet. Exh. 196 (brief of Mr. Demjanjuk in support of his motion for a mistrial).

[403] Judge Battisti did not rule on this ground. See *United States v. Demjanjuk*, 518 F.Supp. 1362, 1384-86 (N.D.Ohio 1981).

of interrogatories. Setting aside the improper influence argument, the mistrial motion thus turned on the scope of Mr. Demjanjuk's first interrogatory, and the government's duty to supplement its response to that question under Fed. R. Civ. Proc. 26(e).

Mr. Moscowitz and Mr. Horrigan testified that they both believed at the time of the denaturalization case that over the course of discovery, Mr. Demjanjuk implicitly limited the scope of his first, broad request.[404] In particular, the government attorneys felt that the fourth interrogatory of his fourth set restricted the scope of his first interrogatory to Soviet witnesses whom the government expected to call as witnesses. They explain this most succinctly in their brief to Judge Battisti:

> In any event, any duty the government may have had with regard to the disclosure of Soviet witnesses was specifically modified by the defendant himself.
>
> Question 4 of defendant's Fourth Set of Interrogatories, filed April 14, 1980 states:
>
> 4. Within 7 days after the expected Soviet witnesses are confirmed to be witnesses or deponents in this matter state:
>
> (a) Each persons' name and address
>
> (b) Each persons' expected testimony and specifically whether or not each person is an eyewitness to the allegations set forth in Counts II and/or III of plaintiff's Complaint.
>
> (c) Set forth in detail any identification procedures used in conjunction with such Soviet witnesses including:

---

[404] See Moscowitz testimony at 41-42, 44; Horrigan testimony at 335-36.

1. The specific method of identification;
2. The photos used, if any;
3. The person conducting the identification procedure; and
4. The date of the positive identification of the defendant or a suspected photo of the defendant.

(d) Is plaintiff or its agents in possession of any written statements made by any of the above-mentioned persons. If so, will plaintiff attach such statements to the answers to these interrogatories.

Certainly, this question modified any duty under Question 1 of the First Set of Interrogatories with regard to supplementation. The defendant through his questions has set up Soviet witnesses as a special class. Defendant clearly indicates that he is not interested in any Soviet witnesses until and unless the government either intends to call them at trial or depose them.[405]

They also argued this position before Judge Battisti at oral argument.[406]

With respect to Mr. Sztajer (who, as an Australian, was not within the "special class"), the government argued that they had provided his name as someone who had failed to identify Mr. Demjanjuk, but that Mr. Demjanjuk had failed to ask them "the further interrogatory question" which would have revealed that Mr. Sztajer was a person who had also "misidentified" someone other than Mr. Demjanjuk as the Ivan who had worked at the Treblinka gas chambers.[407]

---

[405] See Pet. Exh. 226 at 5-6.

[406] See mistrial transcript at 1501.

[407] See Moscowitz testimony at 141-43.

In an impassioned plea, Mr. Martin urged Judge Battisti to reject the government's argument:

> "Misidentification."
>
> Your Honor, we asked for persons who had not identified – who were shown photos, did not identify the defendant; perons who had been shown photos and did make an identification.
>
> He maintains that he gave us this information from the gentleman in Australia because he provided us with his name under the interrogatory "persons who failed to make an identification." And he maintains now that we should not have gotten this person's affidavit or sworn statement because he did not identify the defendant, but that he misidentified the defendant.
>
> That's his opinion; that's his term of "misidentification."[408]

Then, with a phrase that now appears to have been quite prescient:

> If we are to accept the Government's version of "misidentification" versus "failure to identify," then we don't know if 1,000 persons "misidentified" the defendant and and said someone else was Ivan.[409]

Mr. Martin refined this argument in his reply memorandum, where he stated that merely because the government had provided Mr. Sztajer's name in response to the photo-

---

[408] Denaturalization transcript at 1456-57.

[409] Id. at 1457. See also id at 1512, stating:

> Now, it might open up a whole new floodgate of information. If we have been led to believe that people misidentifying a person, it's not only identifying the photograph, but we just didn't use the term "misidentify"; and we might have a number of other witnesses in Australia or somewhere who "misidentified". So we don't know where it's going to lead.

spread interrogatory did not relieve them of the responsibility to provide it in response to Mr. Demjanjuk's other interrogatories.[410]

Judge Battisti ordered the government to produce the statements, but eventually ruled that the government had been under an obligation to produce only Mr. Dorofeev's name. Judge Battisti reasoned that because Fed. R. Civ. Proc. 26(e)(1)(A) requires supplementation only "with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters,"[411] and because only Dorofeev claimed to have any knowledge of Mr. Demjanjuk, the government was under no obligation to produce the remaining names.[412] Judge Battisti considered Mr. Dorofeev's statement, and concluded that the production of his name would not have affected the outcome of the trial. Implicitly, therefore, Judge Battisti rejected the government's claim that, with respect to Soviet witnesses, the fourth question of the fourth set of interrogatories limited the scope of the first question of the first set to those whom the government intended to call as witnesses at trial.[413] Nevertheless, Judge Battisti did not "ascribe any sinister motivation to Government counsels' conduct."[414]

With respect to the government's failure to produce Mr. Sztajer's name, Judge Battisti observed that the govern-

---

[410] See Pet. Exh. 227.

[411] Fed. R. Civ. Proc. 26(e)(1)(A). See also *United States v. Demjanjuk*, 518 F.Supp. 1362, 1384 n.51 (N.D.Ohio 1981).

[412] See 518 F.Supp. at 1384-85.

[413] See id. at 1385 n.52; Mr. Moscowitz conceded in his testimony before me that Judge Battisti rejected their understanding that the interrogatory's scope was limited. See Moscowitz testimony at 138, 271-72.

[414] 518 F.Supp. at 1385.

ment had produced the name in response to the photo-spread interrogatory, and that Mr. Demjanjuk "apparently never contacted Sztajer or sought additional discovery concerning information Sztajer might possess."[415] Judge Battisti concluded:

> Consequently, the Court does not believe that the effects of defendant's lack of diligence in pursuing information offered at an earlier date should be visited upon the Government at this time. Defendant's motion for a new trial on this alternative ground is therefore denied.[416]

N. The Judgment

On June 23, 1981, Judge Battisti concluded that the government had proven by clear and convincing evidence that Mr. Demjanjuk had served in the SS at Trawniki and Treblinka,[417] and ordered him stripped of his citizenship. Judge Battisti held that the Trawniki card was authentic, and established that Mr. Demjanjuk had been at Trawniki.[418] He also found that the photographic identifications were reliable and not impermissibly suggestive, that the survivor testimony was credible, and that Mr. Demjanjuk's version of events was not supported by the evidence. For these reasons, he found that Mr. Demjanjuk had served at Treblinka, as well.[419]

---

[415] Id. at 1386.

[416] Id.

[417] Judge Battisti held that, in light of his decision on the other two camps, he didn't need to decide whether Mr. Demjanjuk had also been a guard at Sobibor.

[418] 518 F.Supp. at 1368.

[419] Id. at 1376.

The Sixth Circuit Court of Appeals affirmed the denaturalization decision,[420] and the Supreme Court denied certiorari.[421]

O. The 1982 Polish Main Commission Dispute

While the Supreme Court considered Mr. Demjanjuk's petition for certiorari in his denaturalization case,[422] John Martin, his defense attorney, received a copy of the August 31, 1979, letter from Dr. Czeslaw Pilichowski to Martin Mendelsohn.[423] On August 5, 1982, Mr. Martin wrote a letter to Allan Ryan, Jr., informing Mr. Ryan of his receipt of the letter, asking him to confirm that the OSI had received the document as indicated in it, and requesting a copy of the documents described in the letter.[424] Mr. Ryan was on vacation, and the letter apparently was routed within the OSI to Norman Moscowitz.[425] Without discussing the matter with his superiors,[426] Mr. Moscowitz replied to Mr. Martin by letter dated August 17, 1982:

> Dear Mr. Martin:
>
> In response to your letter of August 5, 1982, I enclose copies of the reports referenced in Dr. Pilichowski's letter of August 31, 1979, to Mr. Mendelsohn.

---

[420] *United States v. Demjanjuk*, 680 F.2d 32 (6th Cir. 1982).

[421] *Demjanjuk v. United States*, 459 U.S. 1036 (1982).

[422] See id.

[423] David Springer, Liudas Kairys' defense attorney provided Mr. Martin with the copy of the letter. See Springer deposition upon written questions at 2-3 (response to Mr. Demjanjuk's cross-question 2).

[424] See Pet. Exh. 38.

[425] See Ryan testimony at 43.

[426] See id; Sher deposition at 50. Mr. Sher recalls none of the events surrounding this correspondence. See id. at 49-53.

> Please note that we are providing this material to you as a matter of courtesy and not under any obligations of discovery, which ended long ago.[427]

Mr. Martin read the materials, and then sent a second letter to Mr. Ryan on October 26, 1982, which began: "Your response to my letter dated August 5, 1982, is acknowledged."[428] Mr. Martin stated that "there is information there that would have been of great assistance to defendant's counsels in cross-examining and discrediting several government's witnesses,"[429] and requested that the OSI produce additional documents:

> I am requesting that you make available to defendant's counsels any and all materials you received from foreign governments that pertained to the defendant or any locale defendant was in or alleged to have been between the years 1940 and 1952. We are particularly interested in any and all documents, materials, etc. received from the Soviet Union, West Germany, Israel, and Poland. You will recall that we had to have foreign documents, particularly from the Soviets, filtered through the State Department via your office.[430]

Although Mr. Ryan has no recollection of receiving the letter, it is clear that he was nonplussed by it. He had no knowledge of the earlier letter, or of the response which Mr. Martin said Mr. Ryan had written. Mr. Ryan wrote "What is this all about?" at the top of the letter and delegated Judge Einhorn to investigate the matter and prepare

---

[427] Pet. Exh. 39.

[428] See Pet. Exh. 40.

[429] Id.

[430] Id.

a response.[431] By this time, Mr. Moscowitz had either already left the OSI, had been relieved of duties on the Demjanjuk case, or had been assigned to the United States Attorney's Office in the District of Columbia for training in trial techniques.[432] Mr. Ryan told Judge Einhorn that discovery in the Demjanjuk case was closed and would not be reopened.[433]

Judge Einhorn examined the case file for Mr. Demjanjuk's prior discovery requests and for unsatisfied court orders,[434] but testified that he did not "audit" the file comprehensively.[435] He attempted to contact Messrs. Moscowitz and Horrigan, but does not recall if he was able to reach either man.[436] On or about November 4, 1982, he drafted and signed the following response, which he sent to Mr. Ryan for approval:

> Dear Mr. Martin:
>
> In response to your October 26, 1982 letter to OSI Director Allan A. Ryan, Jr., please be advised that all relevant and discoverable documents in the Government's possession have been provided to you under the Federal Rules of Civil Procedure, and the case, as you know, is now before the Supreme Court on your petition for certiorari.
>
> Accordingly, your October 26 request for further discovery serves no purpose, and we have undertaken no inquiry to determine whether the documents you ask for in that letter have already been provided to

---

[431] See Ryan testimony at 157-59; Einhorn testimony at 32-35.

[432] See Moscowitz testimony at 8.

[433] See Einhorn testimony at 77.

[434] See Einhorn testimony at 33, 39.

[435] Id. at 52-53, 58.

[436] See id. at 33-34, 36, 37-40, 49.

you, or indeed whether such documents even exist.[437]

According to Judge Einhorn, Mr. Ryan asked for revisions, and provided additional language, which resulted in a second draft of the letter seven days later, on November 11:

> Dear Mr. Martin:
>
> The Office of Special Investigations is in receipt of your October 26, 1982 letter to OSI Director Allan A. Ryan, Jr.
>
> In that letter, you refer to documents forwarded to you on August 17, 1982 by OSI attorney Norman Moscowitz (You are inaccurate in your letter, in asserting that Mr. Ryan rather than Mr. Moscowitz signed the cover letter under which those documents were mailed to you.). Those documents—none of which refer to your client—were provided to you, in Mr. Moscowitz's words, "as a matter of courtesy and not under any obligations of discovery, which ended long ago." Our sending these documents to you does not constitute a reopening of the denaturalization proceedings against your client. Indeed, all relevant and discoverable documents in the Government's possession have already been made part of the record of those proceedings. As a result of those documents, and other evidence, you client was denaturalized.
>
> You[r] further request for discovery, made in your October 26th letter, is therefore respectfully denied. Your objections to the denaturalization proceedings in this case have been registered with the United States Supreme Court, which OSI is confident will leave the decisions of the District and Circuit Courts undisturbed.[438]

---

[437] See Pet. Exh. 41.

[438] Pet. Exh. 42.

Judge Einhorn then sent this draft, too, to Mr. Ryan, but did not know which draft ultimately was sent.[439] Judge Einhorn also testified that at the time he wrote both drafts, he was not aware of any information which would cause him to doubt the correctness of the denaturalization judgment.[440]

I find that the OSI mailed the November 4 draft, but did not mail the November 11 draft. All parties to this correspondence sent copies to Judge Battisti, but the only copy found in the record was the November 4 draft.[441] The November 11 draft does not refer to the November 4 draft, and is redundant with that document in several respects. It appears probable, therefore, that Judge Einhorn prepared both drafts at or about the date indicated on each, and that sometime after the second draft, someone in the OSI decided that the first, and not the second, letter would be sent to Mr. Martin and the Court.

The sole remaining question is whether the November 4 draft, which in any event the Court received, was deceptive to the extent that Judge Einhorn stated that he had not conducted an inquiry to determine if the OSI possessed any documents responsive to the request. Judge Einhorn himself testified that his purpose in writing this second draft was to provide a "more correct impression of what had been done."[442] There are two responses to this question: first, even assuming that the letter is deceptive, it is not a deception on which either Mr. Demjanjuk or the Court could have relied. The statement that one has not conducted a search for responsive documents is, in fact, a

---

[439] See id. at 51, 54.

[440] Id. at 80.

[441] Unfortunately, Judge Battisti's chambers did not stamp the letter with the date of its receipt.

[442] Einhorn testimony at 66.

statement that the OSI did not intend to respond in a cooperative manner. Second, the letter is literally true: Judge Einhorn testified that he reviewed Mr. Demjanjuk's discovery requests and the Court's orders;[443] he did not testify that he reviewed the OSI's files for documents responsive to Mr. Martin's October 26, 1982, letter, which contained a much broader request, and did not refer specifically to prior discovery requests.

P. Post-Judgment Motions

On October 26, 1983, Mr. Demjanjuk moved to vacate the denaturalization judgment, claiming that the Department of Justice, with the Soviet government's collaboration, had perpetrated a fraud on the court by presenting perjured testimony and falsified evidence at the denaturalization trial. Mr. Demjanjuk alleged, inter alia, that the government had obtained Otto Horn's identification of Mr. Demjanjuk by fraud. The District Court found no evidence of fraud and denied the first motion to vacate.[444]

In 1984, Mr. Demjanjuk filed a second motion to vacate, alleging improprieties in the original trial and the discovery of new evidence. The District Court again denied the motion, stating that it "raise[d] nothing new pertaining to Demjanjuk's denaturalization proceedings."[445] The Sixth Circuit affirmed the denial of Mr. Demjanjuk's motions to vacate the denaturalization judgment,[446] and the Supreme Court denied certiorari.[447]

---

[443] See Einhorn testimony at 33, 39, 52-53, 58.

[444] *United States v. Demjanjuk*, 103 F.R.D. 1, 5-8 (N.D.Ohio 1983).

[445] *United States v. Demjanjuk*, No. 77-923 slip op. at 8 (N.D.Ohio Feb. 12, 1985), reprinted in Respondent's Appendix to the Sixth Circuit at 333, 340.

[446] *United States v. Demjanjuk*, 767 F.2d 922 (6th Cir. 1985).

[447] *Demjanjuk v. United States*, 474 U.S. 1034 (1985).

Q. The Deportation Proceedings

On December 6, 1982, the Immigration and Naturalization Service began deportation proceedings against Mr. Demjanjuk. To show that he was subject to deportation, the government relied on the record in the denaturalization proceeding.[448] Mr. Demjanjuk submitted new evidence, however, including the testimony of two Polish citizens, Eugenia Samuel and Stanislaw Swistek, who knew a Treblinka guard named Ivan; and the August 31, 1979, letter to Martin Mendelsohn from Dr. Czeslaw Pilichowski of the Polish Main Commission for the Investigation of Hitlerite Crimes. The letter stated that the Main Commission had no information on Mr. Demjanjuk or two other OSI subjects.[449]

Frank Walus also testified that he made several trips to Poland on Mr. Demjanjuk's behalf.[450] On one trip, Mr. Walus learned from the Polish Main Commission that it had no information on Ivan the Terrible.[451] Mr. Walus also interviewed Polish citizens who lived in the villages near Treblinka. These villagers knew of Ukrainian guards named Ivan, but none had heard of a guard nicknamed "Ivan Grozny" or "Ivan the Terrible."[452] Also, none of the villagers had ever been inside the upper camp at Treblinka where the gas chambers were located.[453]

After hearing Mr. Demjanjuk's additional evidence, on May 23, 1984, an immigration judge found Mr. Demjan-

---

[448] See Resp. Exh. 62 (Immigration Judge and Board of Immigration Appeals decisions).

[449] See Pet. Exh. 156; see also Resp. Exh. 63 (index showing that Mr. Demjanjuk submitted the Polish Main Commission letter).

[450] See Resp. Exh. 59 (transcript of deportation proceedings).

[451] Id. at 52-53.

[452] Id. at 46, 50, 57.

[453] Id. at 69.

juk deportable based on his unlawful entry into the United States and his participation in Nazi persecution of Jewish people during World War II.[454] The Board of Immigration Appeals dismissed Mr. Demjanjuk's subsequent appeal.[455] The Sixth Circuit affirmed the Board's decision,[456] and the Supreme Court denied certiorari.[457]

R. The Extradition Proceedings

On behalf of the State of Israel, the United States Attorney in Cleveland filed a complaint on November 18, 1983, seeking the extradition of John Demjanjuk.[458] On February 27, 1986, following the denial of his petitions for a writ of habeas corpus, Mr. Demjanjuk was extradited to Israel, where he stood trial, was convicted, and sentenced to death.[459]

The role, if any, of the United States Department of Justice in obtaining the Request for Extradition from Israel, while not itself one of the issues before the Court, provides insight into the decisionmaking processes within the Office, insight which is relevant to the questions posed by the Court in its order of reference.

The record as developed in these proceedings establishes that the policy of seeking extradition requests from for-

---

[454] *Matter of Demjanjuk*, A8 237 417 (Immigration Court May 23, 1984) (Resp. Exh. 62).

[455] *Matter of Demjanjuk*, A8 237 417 (BIA Feb 14, 1985) (Resp. Exh. 62).

[456] *United States v. Demjanjuk*, 767 F.2d 922 (6th Cir. 1985).

[457] *Demjanjuk v. United States*, 474 U.S. 1034 (1985).

[458] See *Matter of Demjanjuk*, 584 F.Supp. 1321, 1324 (N.D.Ohio, 1984).

[459] See *Israel v. Demjanjuk*, Criminal Case (Jerusalem) 373/86 (D.Ct. Jerusalem), reprinted in Respondent's Appendix at 432, et seq., submitted to the Sixth Circuit Court of Appeals, July 16, 1992.

eign governments developed separately from, and without the knowledge of, the line attorneys who developed and tried the denaturalization case. One unfortunate consequence of this separation was that the OSI lawyers providing information to the Israelis were not those who had developed it for use in the denaturalization trial.

The line attorneys in the Demjanjuk denaturalization trial did not foresee the extradition of their quarry. George Parker testified that he did not understand extradition to be a realistic possibility:

> [O]ur state of mind at that point in time was that [denaturalization] was going to be probably a symbolic act, we were going to denaturalize people and they would never leave this country given the course of events and deportation proceedings in the past 30 years.[460]

He further stated that he had never discussed extradition with his mentor and supervisor, Martin Mendelsohn, nor with his coworker, Norman Moscowitz.[461] Donald Couvillon, who worked on the Demjanjuk case before Mr. Parker, also responded negatively when questioned about whether he had ever personally thought of extradition as a possibility: "I never thought about that. That was light years away from where we were."[462] Similarly, Norman Moscowitz does not recall discussing extradition as a possibility while he worked at the OSI.[463]

---

[460] Parker testimony, vol. I at 52. See also id. at 51-54. Throughout his testimony on this issue, Mr. Parker confused deportation with extradition. He was not alone in considering the two terms to be interchangeable. See note 8, below.

[461] See Parker testimony, vol. I at 197.

[462] See Couvillon deposition at 137.

[463] See Moscowitz testimony at 131-32. Mr. Moscowitz first heard extradition mentioned years after the denaturalization trial, when Mr.

These witnesses' testimony is credible, and consistent with each other, but it stands in stark contrast to the substantial documentary and testimonial evidence that establishes that other attorneys within the OSI were, as early as 1980, seriously considering the possibilities, and problems, of seeking extradition requests for OSI suspects.

The OSI began to look into extradition seriously in the late summer of 1980. On August 11, 1980, six months before the beginning of the Demjanjuk denaturalization trial, OSI Director Allan Ryan wrote a memorandum to Michael Abell, who was then in the Office of International Affairs of the Criminal Division of the Department of Justice.[464] In the memorandum, Mr. Ryan described his plans to travel to Europe and the former Soviet Union, and posed several questions to Mr. Abell concerning extradition. Mr. Ryan considered extradition as an attractive option in cases dealt with in his Office:

> One topic I would very much like to explore before my departure, and raise with these governments if appropriate, is the possibility of extraditing Nazi war criminals to those countries that have extradition treaties with the United States. Extradition offers a number of advantages to carrying out the Congressional and Attorney General's mandate to take appropriate legal action against Nazi war criminals, and chief among these is the opportunity of avoiding the protracted legal proceedings involved in denaturali-

---

Demjanjuk was actually extradited. Id.

Walter Rockler also does not recall ever discussing extradition with OSI employees during his tenure as Director. See Rockler deposition at 58-59.

[464] Pet. Exh. 223 (memorandum from Ryan to Michael Abell, dated August 11, 1980).

zation and deportation actions. Preliminary investigation of this matter by my staff convinces me that further exploration is warranted, and I am giving the matter a high priority within OSI.[465]

---

[465] Id. at 1.

The memorandum is, admittedly, susceptible of several interpretations. Nevertheless, three things trouble me about Mr. Ryan's argument. First, as did Mr. Parker when testifying, Mr. Ryan's memorandum presumes that extradition is interchangeable with denaturalization followed by deportation, and that these two paths achieve the same result. Although superficially true—both procedures result in the relocation of the accused to a foreign country—there are substantial differences. A United States citizen may be extradited to stand trial in a foreign country, and may return if acquitted, or upon serving a sentence imposed after a conviction (although obviously, the latter is not an option in capital cases). A denaturalized and deported person does not possess this right. The use of extradition, moreover, does nothing to remedy an allegedlly fraudulent naturalization (in the case of suspected Nazi war criminals who are naturalized citizens). Conversely, denaturalization, although possessing a substantially punitive character, is an equitable proceeding intended to place the accused in the position he occupied (i.e., an alien to the U.S.) before he committed fraud, and is not intended to punish the accused.

Second, although the lines between these actions sometimes blur, it is incumbent upon government attorneys to assess the merits of each processing in light of each case's particular circumstances. There may be instances in which denaturalization is appropriate, but not extradition, or vice versa. Mr. Ryan's memorandum gives the appearance of setting aside those distinctions which I believe a prosecutor is duty-bound to consider.

Third, the simple calculus suggested by one reasonable reading of Mr. Ryan's memorandum—i.e., simply counting the number of appeals available to the accused (see also Ryan testimony at 58-60)—is antithetical to the spirit of the Due Process Clause of the Fifth Amendment. The appellate avenues available to an accused individual are necessary and indispensable components of the truth-finding process, and prosecutors whose objective is the vindication of the

Mr. Ryan's deputy, Neal Sher, pursued the matter with his staff a month later, when he wrote a memorandum asking the OSI attorneys to submit extradition-related information on pending cases.[466] In June, 1981, after Judge Battisti had ruled in the denaturalization trial, Allan Ryan travelled to Israel, where he met with officials and for the first time discussed the extradition of OSI suspects to that country.[467] At the meeting, the Israeli officials provided Mr. Ryan with a memorandum of legal issues to be resolved, written by Marvin Hankin of the Israeli Justice Ministry.[468] Upon Mr. Ryan's return, Mr. Sher charged

---

Nation's interests must not view them as obstacles to be side-stepped if possible.

Obviously, Mr. Ryan's arguments were irrelevant to the proceedings against Mr. Demjanjuk, which travelled down both paths. See Sher testimony at 96. There is no evidence in the record that the OSI (either during Mr. Ryan's tenure or thereafter) employed the use of extradition as an expeditious alternative.

[466] Pet. Exh. 180 (memorandum to staff attorneys from Sher, dated September 5, 1980). As discussed above, Mr. Moscowitz does not recall discussing extradition within the OSI. He either did not receive this letter, or does not recall receiving it. The latter is not improbable, given that in the fall of 1980, he was preparing for the upcoming Demjanjuk trial. One possible explanation is that Judge Einhorn, who was assigned to the Demjanjuk case in August, 1980, answered the questions. Judge Einhorn does not specifically recall doing so, and thinks that it is unlikely, given his junior status on the case. He testified, however, that he saw the memorandum, and that the answers relating to the Demjanjuk case were given to Mr. Sher. See Einhorn testimony at 69.

[467] Mr. Ryan briefly describes this meeting in a memorandum he wrote to Neal Sher on June 25, 1981, Pet. Exh. 199, and in his handwritten notes of the trip. Pet. Exh. 240. See also Ryan testimony at 61-64.

[468] See id.; Pet. Exh. 73A, at 1 (memorandum from Rosenbaum to Ryan, dated January 24, 1982.

Judge Einhorn—who had been researching extradition issues already—with the task of reviewing the Israeli memorandum and drafting a memorandum in response. Judge Einhorn completed this task on July 10, 1981, and sent a memorandum to Mr. Sher.[469]

Five months later, three OSI attorneys, including Deputy Director Sher, met with Israeli police and Justice Ministry officials in Jerusalem. In a memorandum memorializing the meeting, OSI attorney Eli Rosenbaum describes Mr. Sher engaging in an extensive dialogue with the Israeli officials regarding the selection criteria and political ramifications of the first extradition request of a suspected Nazi war criminal from the United States to Israel:

> As to the selection of "candidates" for extradition, [Mr. Sher] stressed that these individuals must be chosen carefully. Messrs. Hankin and Goldman thereupon expressed a preference in this regard for someone who had actually committed *murder*. [Mr. Sher] responded by noting that we do have quite a few cases of this nature, but he pointed out that, in the case of former Treblinka guard Feodor Fedorenko, none of the courts involved at the denaturalization stage had specifically found that the defendant had participated in murder. Goldman then asked [Mr. Sher] whether he was prepared to *suggest* an initial candidate for an Israeli extradition request, and [Mr. Sher] replied that he was not in a position to do so at this time. He pointed out that, in any event, it is the *State Department* which makes the first decision as to whether an extradition request from a foreign state will be honored. Later in the meeting, Goldman asked Col. Russek whether he could suggest a suitable sub-

[469] Pet. Exh. 200. See also Einhorn testimony at 71-72.

> ject for an Israeli extradition request, and Russek thereupon stated his preference for John Demjanjuk as a "proper case."[470]

(Emphasis in original.) According to Mr. Rosenbaum's memorandum, Mr. Sher discussed the ideal features of a first case for extradition, political concerns relating to the possibility of the imposition of the death penalty in Israel, and the need to get the Department of State "on board" before the lodging of the request.[471] The memorandum states that Mr. Sher and Mr. Goldman "agreed that it would be best for the Israeli authorities to make the initial selection in conjunction with OSI, and with the assistance of Col. Russek [of the Israeli National Police]."[472]

The Rosenbaum memorandum supports Mr. Sher's assertion in his deposition testimony that he did not propose Mr. Demjanjuk's extradition, or solicit a suggestion from the Israelis.[473] The memorandum makes quite clear that one Israeli official solicited the name of a first subject of extradition, and that after Mr. Sher declined to provide a name, another Israeli official, Col. Russek, supplied Mr. Demjanjuk's name.[474] Nevertheless, Mr. Sher's participation in the meeting was not entirely at arms-length from the Israelis at the January, 1982, meeting. The memorandum, written contemporaneously by a member of Mr. Sher's own staff, strongly suggests that the OSI and Israeli officials believed that they would operate in a collaborative, working relationship, with the OSI preparing the ground, legally and politically, for extradition requests

---

[470] Pet. Exh. 73A at 2.

[471] Id. at 3-4.

[472] Id. at 4.

[473] See Sher deposition at 95-99.

[474] See Pet. Exh. 73A at 2.

from Israel. Moreover, it is pellucidly clear from the final sentence quoted above that the participants believed that although the OSI would not suggest a name, it was to play a substantial role in the Israeli's selection of a candidate. Although Mr. Sher declined to name a specific case, he was decidedly less reticent to provide the criteria upon which the selection could be made.

OSI attorneys continued to research the legal issues surrounding the possible extradition of their suspects to Israel. In late January of 1983, approximately ten months before the receipt of the Israeli request for Mr. Demjanjuk's extradition, Mr. Rosenbaum authored a memorandum to Messrs. Sher, Einhorn, and (Robert) Brill of the OSI which constituted a bibliography of source materials on the Israeli Nazi and Nazi Collaborator's (Punishment) Law, under which Mr. Demjanjuk was eventually indicted.[475]

There is scant evidence, however, that the Israeli request itself was actually the product of the collaboration which Mr. Rosenbaum's memorandum foreshadowed.[476] Judge Einhorn testified that he was under the impression, from his reading of the memorandum, and from discussions with OSI personnel, that the Office was to be simply "reactive," and did not participate in the actual selection.[477]

---

[475] Pet. Exh. 202A. This document does not refer to Mr. Demjanjuk.

[476] Judge Einhorn's memorandum to Michael Wolf dicussing the venue for filing the extradition complaint (Pet. Exh. 218) is not evidence of this collaboration. Although this document's date is incomplete (it is only given as December 6), from the memorandum's reference on pages 2-3 to *Immigration and Naturalization Service v. Phinpathya*, 464 U.S. 183 (1984), the memorandum was certainly drafted after the receipt of the Israeli request in November, 1973. The Supreme Court decided *Phinpathya* on January 10, 1984. Id.

[477] See Einhorn testimony at 74-75. This issue arose again during Mr. Demjanjuk's appeal to the Sixth Circuit in the appeal of his

Although Director Sher testified that he discussed Mr. Demjanjuk's case in his 1983 meetings with Israeli officials,[478] there is no evidence that the OSI solicited the extradition. The significant role played by Israeli witnesses in Mr. Demjanjuk's denaturalization trial, and Col. Russek's spontaneous selection of Mr. Demjanjuk during the 1982 meeting also support the proposition that the Israelis decided on their own to prosecute Mr. Demjanjuk, after discussing the case with Mr. Sher and other OSI lawyers.

By November, 1983, when the Israelis transmitted their extradition request, the principal lawyers working on Mr. Demjanjuk's denaturalization case—Messrs. Parker, Horrigan, and Moscowitz—had all ceased working with the OSI.[479] Perforce, the discussions with the Israelis regarding the strengths and weaknesses of the case and its constituents were conducted by lawyers who had not directly participated in its development.

Once the prosecutors in Israel made the decision and filed the request for Mr. Demjanjuk's extradition, they relied on OSI attorneys to supply them with information needed in developing the case in Israel. In December, 1985, Justice Ministry officials gave to Neal Sher a set of

---

habeas corpus petition, challenging his extradition. On June 12, 1985, his lawyer, Mark O'Connor, wrote a letter to the Court after oral argument, and enclosed newspaper articles describing a meeting between OSI personnel and Israeli Justice Ministry Officials in May, 1983. Pet. Exh. 241. He stated in his letter that the OSI had "influenced" the Israeli Justice Ministry to choose Mr. Demjanjuk's case for prosecution. Id. at 1.

Judge Einhorn sent the Court a letter in response, denying that the office had actively sought Mr. Demjanjuk's extradition. Id.

[478] See Sher deposition at 64-67.

[479] See section I.B., above, which briefly describes each man's history with the Demjanjuk case.

questions regarding the case and a set of requests for copies of relevant documents. Mr. Sher assigned Judge Einhorn the task of responding to them, and in a December, 1985, memorandum to an OSI paralegal, he, in turn, asked her to assemble the necessary documents.[480] Over the next several months, Judge Einhorn and the paralegal fulfilled the requests.[481]

The requests and questions of the Israeli prosecutors establish that the flow of information between them and the OSI was, as late as 1985, a trickle relative to the volume of information the Office had either obtained or generated in the course of the Demjanjuk litigation. For example, the Israelis stated in their request that the only pleadings they possessed from the denaturalization trial were the Complaint, Amended Complaint, and the Government's Proposed Findings of Fact and Conclusions of Law.[482] They lacked all documents relating to the Court of Appeals' decision except for the *per curiam* decision of the Court. Likewise, the questions they asked suggest that, even at that late date, they had little understanding of how the OSI put the denaturalization case together. For example, the first question asks: "How did the Americans uncover Demanyuk?" [sic].[483] Others inquired about the investigation, background information on the Trawniki card's history in the Soviet Union, and

---

[480] Pet. Exh. 243 (memorandum to Nancy Kramp from Judge Einhorn, dated December 23, 1985).

[481] See Pet. Exh. 244 (transmittal slip "Nita to Madeline"), dated January 6, 1986); Pet. Exh. 245 (transmittal slip (to "Neal"), dated January 16, 1986); Pet. Exh. 229 (memorandum from Kramp to Einhorn, dated February 13, 1986); Pet. Exh. 204 (memorandum to Sher from Einhorn, dated February 19, 1986).

[482] See Pet. Exh. 243 at 3, request 4.

[483] Id. at 2, question 1.

other elementary facts.[484]

More troubling than this general impression is the OSI's draft response to the tenth question posed by Israeli prosecutors:

> 10. How were the Soviet witnesses who submitted affidavits located? Through the Vinnitsky State Archives or in some other way?[485]

As Judge Einhorn wrote in a memorandum to Mr. Sher accompanied by his draft responses, the Israeli prosecution team had at that time not yet seen the Fedorenko (1979) Protocols from the Soviet Union.[486] Judge Einhorn interpreted this question, therefore, to refer to affidavits submitted by Soviet officials (from the Vinnitsky State Archives) which certified the Trawniki card as an authentic document.[487] Nevertheless, in his draft response, he described the Fedorenko Protocols as follows:

> There are two kinds of Soviet "affidavits" in OSI's *Demjanjuk* case files. One kind includes several 1979 protocols of Soviet citizens which OSI never used in its prosecution of Demjanjuk. These protocols did not relate to Demjanjuk's service at Treblinka. Moreover, OSI is unaware of exactly how Soviet authorities located the subjects of those protocols.[488]

---

[484] Mr. Sher does not recall discussing with Israeli officials either the specific strengths and weaknesses of the Demjanjuk case or whether the office possessed exculpatory evidence. See Sher deposition at 67-70.

[485] Pet. Exh. 243 at 2, question 10.

[486] See Pet. Exh. 204, at 6. For a discussion of the Fedorenko Protocols and their history in the litigation in the U.S., see section II.E.

[487] See *United States v. Demjanjuk*, 518 F.Supp. 1362, 1365-66 (N.D.Ohio 1981).

[488] Pet. Exh. 204 at 6-7.

This statement, while true under the circumstances known to Judge Einhorn (as he could glean them from the final case presented to Judge Battisti), deprived the Israeli prosecution team of information on which it could have based its own conclusion regarding the resolution of the evidentiary conflict created by the Leleko and Malagon statements.

The theme of this history is the stepwise depletion of information between the OSI attorneys who developed the case, and their Israeli counterparts who prosecuted Mr. Demjanjuk several years later. Messrs. Parker, Moscowitz, and Horrigan investigated the facts without an eye toward extradition and criminal prosecution. The initial set of pieces of evidence was, therefore, developed for the limited purpose of denaturalization, whose standards could be satisfied through the proof of several alternatives. The attorneys who met with the Israeli officials, although well-read in the extradition option they had researched, did not know the case's developmental history. The set of pieces of evidence was next depleted both quantitatively—by not turning over all of the pieces (e.g., the Fedorenko Protocols)—and qualitatively—by not turning over complete information regarding the OSI's interpretation of the evidence. The end result was that the Israeli prosecution team inherited only the case as it had been presented to the Court—a road map with the "dead ends" (as determined by Messrs. Parker, Moscowitz, and Horrigan) omitted.

S. The FOIA Litigation

In 1986, Edward Nishnic (Mr. Demjanjuk's son-in-law) and several other individuals filed Freedom of Information Act (FOIA) requests of the Department of Justice. Mr. Nishnic sought:

> All investigative files maintained by the Justice Department's Office of Special Investigations (Criminal Division) for John (a.k.a. IVAN) DEMJANJUK. This includes any and all pre-trial investigations conducted external to the United States (i.e. Federal Republic of (West) Germany, Israel, U.S.S.R.). This request *does not* include trial briefs, opinions of the court, and related legal matters.[489]

The Department declined to produce the files, and Mr. Nishnic sued for their release. On March 15, 1987, Judge Oberdorfer granted the Department's motion for summary judgment in part, permitting them to withhold from release several Reports of Investigation (ROIs) on the grounds that the ROIs constituted work product.[490] In September, 1987, however, Judge Oberdorfer denied the Department's similar argument with respect to the Soviet protocols, and he ordered them released.[491] In late December of that same year, the Soviet protocols were released to Mr. Nishnic,[492] and in February of 1988, the Department released to him redacted copies of the ROIs, despite the Department's victory on this issue in Judge Oberdorfer's court.[493]

---

[489] See Pet. Exh. 248 (attachment to a memorandum from Judge Einhorn to Andy Lachance of the Executive Office of U.S. Attorneys).

[490] See *Nishnic v. Department of Justice*, 671 F.Supp. 771 (D.D.C. 1987).

[491] See *Nishnic v. Department of Justice*, 671 F.Supp. 776, 810-14 (D.D.C. 1987). Judge Oberdorfer denied the Department's motion for reconsideration on October 20, 1987. See *Nishnic v. Department of Justice*, 1987 WL 19434 (D.D.C. 1987).

[492] See Pet. Exh. 252 (letter from FOIA staff to John Broadley, Mr. Nishnic's attorney, dated December 12, 1987).

[493] See Pet. Exh. 254 (letter from Sher to Broadley, dated February 4, 1988).

III. The Discovery Requests

A. The Request for Production of Documents

On November 18, 1977, Mr. Demjanjuk's lawyer, John Martin served on the government a request for production of documents. The request was broadly worded, and called for:

> any and all writings, documents, memoranda, written or recorded statements of the defendant or potential witnesses, books, letters, photographs, maps, charts, prior testimony, or statements taken under oath or without an oath, by anyone concerning the actions of the defendant as alleged in plaintiff's complaint, and any and all other material now in possession of plaintiff and relating to the denaturalization proceedings now pending against the defendant.[494]

Joseph A. Cipollone, the Assistant United States Attorney working on the case at the time, filed a "motion to overrule" the request for production on January 25, 1978, in which he asserted that the Freedom of Information Act and the Privacy Act precluded the government from complying with the request.[495] On March 5, 1978, Magistrate Jack Streepy denied the government's request on the grounds that until Mr. Demjanjuk moved to compel the production, the issue was not properly before him.[496]

During this same period of time, Mr. Demjanjuk had been seeking to obtain information relating to his case

---

[494] Pet. Exh. 2.

[495] See Pet. Exh. 4; see also Pet. Exh. 5 (Mr. Demjanjuk's brief opposing the government's motion).

[496] See Pet. Exh. 8 (memorandum and order, dated March 5, 1978). It is not clear from Magistrate Streepy's opinion why he did not consider the government's motion as one seeking a protective order under Fed. R. Civ. Proc. 26(c).

directly from the government of the U.S.S.R. On February 10, 1978, the Soviet Embassy in Washington replied to Mr. Martin's request, and instructed him that he would have to apply to the United States State Department.[497]

Mr. Martin became frustrated in his attempts to obtain Soviet documents, and matters came to a head in June, 1979. On June 4, 1979, Mr. Martin filed a motion to compel the production of documents, in essence reciting the language of his request for production.[498] Magistrate Streepy held a pretrial status conference that same day, which Mr. Martin, his co-counsel Spiros Gonakis, and Messrs. Horrigan, McLaughlin, and Mendelsohn attended.[499] The central question with respect to the request for production is whether it remained viable following this meeting, or whether, as Mr. Horrigan testified, it was a "dead letter."[500]

There are three different sources of evidence for what took place at the pretrial conference. First, Magistrate Streepy entered a one-page minutes of the conference in the record.[501] Second, Mr. Mendelsohn testified about the meeting, and memorialized it in an internal memorandum he wrote shortly after it took place.[502] Finally, Mr. Horrigan testified about the meeting.

---

[497] See Pet. Exh. 6 (letter from Soviet consul to Martin).

[498] There is no dispute that the June 4, 1979, motion to compel related to Mr. Demjanjuk's November, 1977, request for production. See Mendelsohn testimony at 124-35.

[499] See Mendelsohn testimony at 112; Horrigan testimony at 319-20; Pet. Exh. 11. Mr. McLaughlin was another Assistant United States Attorney who worked with Mr. Horrigan.

[500] See Horrigan testimony at 332, 335; see also discussion below.

[501] See Pet. Exh. 11.

[502] See Pet. Exh. 91; Mendelsohn testimony at 112-13.

Magistrate Streepy's minutes provide little information about what transpired. The minutes entry reads:

> U.S. intends to file interrogatories within 2 days and seeks to depose Defendant again (Defense objects), will file admissions requests and depose others. Defense seeking documents from Russia [sic], through U.S. State Dept., unsuccessful in more than a year. U.S. will attempt to obtain them for defendant, once defense gives U.S. a list of requested documents (dependent upon defendant's request). Defense intends to obtain documents, or seek same from Israel, Poland and Germany. Discovery to be completed by December 4, 1979.[503]

These minutes reflect the one fact upon which all sources agree: Mr. Mendelsohn offered to assist Mr. Martin in obtaining foreign documents for Mr. Demjanjuk.[504]

In his contemporaneous memorandum, Mr. Mendelsohn stated that Magistrate Streepy denied Mr. Demjanjuk's motion to compel because Mr. Martin had not attempted to resolve the dispute in a conference amongst the lawyers.[505] Mr. Mendelsohn agreed to assist the defense:

> I will prepare requests for admission and have agreed to pass Martin's request for Soviet documents to the State Dept. and ask that it be handled expeditiously.[506]

It is apparent from the tone of Mr. Mendelsohn's memorandum that the tensions which had been resolved in the turf battle continued to hamper cooperation and com-

---

[503] Pet. Exh. 11.

[504] See Mendelsohn testimony at 113.

[505] See Pet. Exh. 91. From the memorandum, Mr. Mendelsohn appears to have believed that the motion was "premature because no formal request had been made." Id.

[506] Id.

munication between him and the Assistant United States Attorneys.[507]

Mr. Horrigan's testimony about the June, 1979, pretrial conference is substantially different from that of Mr. Mendelsohn. According to Mr. Horrigan, he objected to Mr. Demjanjuk's request for production and his motion to compel on the grounds that they were overly broad and that they called for documents protected by the work product doctrine. At this point, Mr. Horrigan testified, Mr. Martin argued that he lacked access to the U.S.S.R. Magistrate Streepy agreed with Mr. Horrigan that the motion was overly broad, but agreed with Mr. Martin that he could obtain specific documents pertaining to Mr. Demjanjuk. He then turned to the government attorneys and asked them if they could assist the defense in obtaining Soviet cooperation. Mr. Mendelsohn said that he would be happy to pass the requests on to the Soviets, and Magistrate Streepy then asked Mr. Martin to narrow his requests.[508] At that point, Mr. Horrigan testified, he believed that Mr. Demjanjuk's motion to compel and his request for production were "dead letters."[509]

Both sides to these proceedings argue that subsequent responses and statements provide evidence relevant to Mr. Horrigan's understanding. Mr. Demjanjuk argues that the government's production of "certain photographs and documents" on November 8, 1979,[510] their production of

---

[507] See id. (stating that "Horrigan claimed that we would be filing interrogatories today when we were before the Magistrate. Afterward, however, he said he would file them today, tomorrow, or this week. . . . The hearing was scheduled for 9:30am. Horrigan had previously told me that it was scheduled for 9:00am; obviously, in an effort to dissuade me from appearing.")

[508] See Horrigan testimony at 329-32.

[509] See id. at 332, 335.

[510] See Pet. Exh. 15.

Mr. Demjanjuk's birth and military records on February 20, 1980 ("pursuant to [Mr. Demjanjuk's] motion to produce"),[511] and their production of other documents and statements[512] all demonstrate that the attorneys believed that the request remained viable.

Mr. Horrigan testified, however, that the subsequent production of materials was either according to a modified understanding which the parties reached at the pretrial conference,[513] or was done pursuant to specific requests for production made in interrogatories—requests which Mr. Horrigan argued only make sense if the initial request had died in June 1979.[514]

A few days after the pretrial conference, Mr. Martin inexplicably mailed a request directly to the State Department.[515] The letter contained two specific requests for documents relating to Mr. Demjanjuk, and one general one:

> 3. True and exact copies (with English translation) of any and all information, including but not limited to newspapers, newsletters, documents, and correspondence received from or given to any foreign government, (including the United States) agency, and or persons whether such persons were acting independ-

---

[511] See Pet. Exh. 25.

[512] See Pet. Exh. 93 (undated receipt for documents inspected).

[513] See Horrigan testimony at 346-49.

[514] See id. at 353 (citing Demjanjuk's Third Set of Interrogatories, Pet. Exh. 27, at Questions 14, 23, 26-28). These statements all ask the government whether they will produce a document without Mr. Demjanjuk having to resort to filing a "motion to produce." See id. It is unclear whether Mr. Martin intended this term to refer to a request for production, or to a motion to compel.

[515] See Pet. Exh. 13 (letter from Martin to State Department Privacy Staff, dated June 11, 1979).

ently or on behalf of a foreign government and/or agency thereof concerning Mr. Demjanjuk.[516]

The State Department did not respond.[517]

Messrs. Martin, Gonakis, Parker and Horrigan attended another pretrial status conference on November 8, 1979. Mr. Parker wrote a memorandum to the file concerning this meeting which provides a narrative of what transpired:

> The following items were discussed. Defendant's motion to compell [sic] an earlier request for discovery. Horrigan stated that this motion had been denied at the June pre-trial conference. Martin responded by saying that the judge had ordered that the parties arrange a meeting at a later date and that the government should agree to hand over all documents it had. That indeed a meeting did occur, it lasted 3½ minutes and Horrigan produced no documents. Horrigan then produced a response to his motion to produce saying that he would agree to disclose all our documents at a mutually agreeable time. The Judge insisted that a date certain be set and Horrigan agreed to do this on Thursday, November 15, at 1:30 pm.
>
> 2. Martin's Request to State Department for Information. Martin stated that he had written to the State Department but has yet received no response from either the State Department or the Soviets. Horrigan retorted that he had been instructed to send his request to Mendelsohn and that Mendelsohn would then send it to the State Department. The Judge then said that yes, that had been his understanding, and he recommended to Martin that he do this.[518]

---

[516] See Pet. Exh. 13 at 1-2.

[517] See Pet. Exh. 17.

[518] See Pet. Exh. 18A.

All of the government attorneys testified that one result of the June, 1979, pretrial conference was that Mr. Martin was to use Mr. Mendelsohn's services in obtaining the assistance of the State Department.[519] Magistrate Streepy memorialized this conference in minutes which read:

> MATTERS CONSIDERED: (1) Pltf is responding today to defdt's production of documents request — counsel to meet on 11/15/79 at 1:30 p.m. for transfer of documents. (2) In re documents from USSR — Defdt will forward necessary letter to Justice Dept., c/o Mr. Mendelsohn & U.S. will then seek documents; . . .[520]

On the same day as the pretrial conference, Mr. Martin forward a copy of his June, 1979, request to Mr. Mendelsohn.[521] A few days later, Mr. Mendelsohn passed it on to Larry Rivera at the State Department, and asked him to handle the request.[522]

In February, 1980, Mr. Parker received the documents responding to Mr. Martin's specific requests, and he provided copies of these to Mr. Martin on February 20, 1980. The next day, Mr. Parker supplemented the government's response to Mr. Demjanjuk's interrogatory relating to foreign investigations:

> *Question*
> 7. Give the name and address of all the people interviewed in the compilation of such foreign investigative report concerning the alleged acts of the defendant at Treblinka.

---

[519] See Mendelsohn testimony at 113-15; Horrigan testimony at 320-21; Parker testimony, vol. II at 36.

[520] See Pet. Exh. 16.

[521] See Pet. Exh. 17.

[522] See Pet. Exh. 92.

Answer

Objection. This is protected by work product privilege.[523]

As described above, Mr. Horrigan testified that he believed that the production of documents subsequent to June 4, 1979, was governed not by the November, 1977, request for production, but by an understanding they had reached during the pretrial conference, and by subsequent specific requets which Mr. Demjanjuk made in interrogatories.

Mr. Moscowitz's understanding was consistent with that of Mr. Horrigan.[524] He has no recollection of the "catch-all" request in Mr. Demjanjuk's request for production, and believed that his requests were limited to specific vital records and statements of Soviet witnesses whom the government expected to call at trial.[525] Mr. Moscowitz found Mr. Demjanjuk's apparent lack of interest in foreign materials "curious," and could not understand why he failed to follow up with specific interrogatories directed at obtaining more information about Soviet witnesses whose names had been provided to him.[526] In contrast to Mr. Horrigan, Mr. Mendelsohn conceded that the government continued to honor Mr. Demjanjuk's request for production even after the June 4, 1979, pretrial conference.[527] Mr. Mendelsohn admitted that despite this belief, the government failed to turn over Soviet documents which it possessed in the latter part of 1979—the

---

[523] See Pet. Exh. 26 (government's Sixth Supplemental Answers to Defendant's Interrogatories, dated February 21, 1980). See also Parker testimony at 37-38.

[524] See Moscowitz testimony at 36-37.

[525] See id. at 38, 40-43.

[526] See id. at 44.

[527] See Mendelsohn testimony at 124-25.

Fedorenko Protocols.[528] He testified that he delegated the task of complying with the discovery requests to Mr. Parker, and that if Mr. Parker had thought that the protocols were relevant, he would have produced them.[529]

There is insufficient evidence to refute the testimony of any of these witnesses, and the discrepancies in their testimony are easily reconciled. It is quite possible that Mr. Mendelsohn and Mr. Horrigan—whose mutual antipathy and jealousy are amply documented in the exhibits—reached differing conclusions following the June 4 pretrial and that they did not share these conclusions with one another. When this fact is coupled with Mr. Mendelsohn's withdrawal from the case and from the OSI over the course of 1979, it is clear that the prosecutor's institutional memory of the status of discovery requests—which was contradictory to begin with—became further incoherent as Mr. Mendelsohn and Mr. Horrigan had to pass on to Mr. Moscowitz and Mr. Parker their understanding of the outcome of the June 4 pretrial conference.

The key which makes Mr. Horrigan's version of events plausible is Fed. R. Civ. Proc. 26(b)(3), which provides an exception to the work product doctrine when "the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." With this in mind, Mr. Horrigan's testimony makes perfect sense within the following scenario: Mr. Martin raised his motion to compel; Mr. Horrigan asserted overbreadth and the work product doctrine; Mr. Martin responded that he was unable to obtain materials from the Soviet Union (presumably in order to establish that the materials fell under the 26(b)(3) exception); and Magistrate Streepy resolved the dispute by asking the government to assist the

---

[528] See Mendelsohn testimony at 118.

[529] Id.

defense. The Magistrate concluded that, in any event, the motion violated local rules, and this is what Mr. Mendelsohn recorded.

What this narrative does not explain, however, is why Mr. Horrigan interpreted these events to relieve the government of the duty to comply with the request for production. That, he (personally) did so is not contradicted by any evidence in the record, however, nor by his own subsequent actions.[530]

It is quite clear, even without the benefit of Mr. Martin's or Mr. Gonakis's testimony,[431] tht the defense team believed that the request for production remained alive. Mr. Gonakis argued at the mistrial hearing:

> Your Honor, as to the affidavit of Mr. Sztajer:
>
> In this case, we filed in 1977 a motion for production of documents.
>
> That motion asked for all documentary material which was pertinent to this case, and it also contained a paragraph at the bottom that said:
>
> "Furthermore, this initial request for production of documents and other material is of a continuing nature and must be supplemented as soon as new or additional information is available."[532]

---

[530] Mr. Demjanjuk argues, inter alia, that Mr. Horrigan's silence at the mistrial hearing proves that there was no understanding that the request for production was dead, and that the agreement is merely Mr. Horrigan's post hoc explanation for his failure to produce the requested documents. I disagree. Although Mr. Horrigan did not specifically raise the question of the agreement or understanding, it is implicit in his agreement that the government was under no duty to produce, among other things, Mr. Sztajer's affidavit. See Mistrial Transcript at 1444.

[531] Neither side called the two original defense lawyers as witnesses.

[532] Mistrial Transcipt at 1438-39.

Similarly, Mr. Martin argued several times that either the Dorofeev Protocols or the Sztajer affidavit was subject to production under the original request.[533]

Mr. Parker apparently did not possess Mr. Horrigan's understanding of the June 4 pretrial conference, and in all likelihood, he obtained his understanding of it from his immediate superior, Mr. Mendelsohn, and from Mr. Mendelsohn's memorandum which was addressed to the OSI's Demjanjuk case file.[534] Mr. Parker probably did not, therefore, understand from the pretrial conference that Mr. Mendelsohn's offer of assistance constituted an attempt to ameliorate the hardship by which, under Rule 26(b)(3), Mr. Martin would otherwise have been able to pierce the work product doctrine. Thus, Mr. Parker believed that his assertion that the names of the Soviet witnesses interviewed were protected by the work product doctrine was novel and bona fide. Unfortunately, Mr. Martin apparently took this assertion at face value, and did not file a motion to compel.[535]

Each of the government attorney's actions with regard to the request for production are thus understandable, but they do not reflect well on the Department of Justice's management of the case as a whole. The government, and not four or five separate attorneys, prosecuted Mr. Demjanjuk and it is quite clear that having promised its assistance, and having asserted that by this assistance, Mr. Demjanjuk could uncover the information which the government wished to withhold on the basis of the work product doctrine, it did little or nothing to ensure that

---

[533] See id. at 1455, 1459, 1482.

[534] See Pet. Exh. 91.

[535] It may be that he did not do so because he was confused about why they would assert it again, in light of his having raised a hardship exception at the June 4, pretrial conference.

the materials it received from the Soviet Union on Mr. Demjanjuk's behalf represented what the government itself had received and had withheld. Mr. Demjanjuk, who dealt with the Soviet officials only through the most indirect means, could not possibly have evaluated the responses he received to determine if they constituted full disclosure, or whether additional requests were required. On the other hand, the government attorneys occupied the unique position of knowing of both the evidence they had received in response their own requests, and that which they received in response to Mr. Demjanjuk's. When their own monitoring of the Soviet responses to Mr. Demjanjuk demonstrated that he continued to face "undue hardship" in obtaining documents from that country, those attorneys who understood that his earlier request for production remained viable remained obligated to supplement their own production as necessary. That they did not do so was neglectful.

Additionally, Mr. Parker's assertion of the work product doctrine strikes me as wholly unjustified. Many of the names which Mr. Parker withheld in his response to this interrogatory (including that of Pavel Leleko) were of Soviet citizens who had been executed many years before, and the government could not plausibly argue that the Soviet military police had, in 1945, acted as agents of the OSI.[536] There is no evidence, however, that he did not believe at the time he made the objection that it was justified.

---

[536] Judge Oberdorfer ultimately rejected a similar argument which the Department of Justice made in the FOIA litigation. See *Nishnic v. Department of Justice*, 671 F.Supp. 776, 811 (D.D.C. 1987), stating:

> The work product precedents cited by defendant do not extend as far as defendant would have us go in this case. It simply strains credulity to base a finding of work product on the assumption that the Soviet interviewers in this case were essentially agents of OSI attorneys. The situation here is not even comparable to cases where work product claims are pressed by co-defendants in litigation or by parties to a merger.

(Citations omitted).

B. The Interrogatories

Over the course of the denaturalization case, Mr. Demjanjuk served five sets of interrogatories on the government. I will discuss three of these—the first, second, and fourth sets.[537]

1. *The First Set of Interrogatories*

Mr. Demjanjuk filed a first set of interrogatories at the same time he filed his first request for production of documents.[538] As he had with the accompanying pleading, Mr. Martin wrote on the cover page that it was the defense's intention that the interrogatories be of a continuing nature:

> It is understood that these interrogatories shall be of a continuing nature and must be supplemented as soon as new or additional information is available.[539]

The first question in the first set of interrogatories sought the names of persons with knowledge of the allegations in the complaint:

> State the name and last known address of every person known to the United States Attorney for the Northern District of Ohio, Eastern Division, or his agents, employees or representatives who claim to have any knowledge of the alleged actions of the defendant alleged in Counts I through VI of plaintiff's complaint.[540]

Question 2 of this same set also asked, "with respect to each person identified in the answer to the previous interrogatory":

---

[537] I have summarized the government's responses to selected questions from the interrogatories. See Appendix 1.

[538] Pet. Exh. 3.

[539] Id.

[540] See Pet. Exh. 3.

> Whether a statement was obtained from each or any of the persons by the United States Attorney for the Northern District of Ohio, Eastern Division, his agents, employees, representatives, or any other Government official or representative thereof.[541]

Thus, the defendant specifically asked for the names of all witnesses to the defendant's alleged actions, and whether statements had been obtained from those people. When read in conjunction with Mr. Demjanjuk's first request for production, he clearly had requested all witness statements.

Government attorneys fully understood that question 1 of the first set of interrogatories was not limited to the identity of persons who implicated Mr. Demjanjuk, as opposed to Ivan the Terrible of Treblinka, in the acts alleged in the complaint. Accordingly, Mr. Mendelsohn furnished the names of Kurt Franz and Franz Suchomel—two former German SS officers at Treblinka who did not identify Mr. Demjanjuk's photograph—in a response to question 1.[542]

Despite the apparent breadth of this request, and despite the specific duty to supplement a "response with respect to any question addressed to . . . the identity and location of persons having knowledge of discoverable matters," imposed by Fed. R. Civ. Proc. 26(e), the government never provided the names of several witnesses as a response to this question. For example, none of the Soviet witnesses appears on any of the government's responses to this question. Nor does the name of Mr. Sztajer, or that of Mr. Lackman.

---

[541] Id.

[542] See Mendelsohn testimony at 136; Pet. Exh. 19 (government's responses to interrogatories); Pet. Exh. 21 (government's second supplemental responses to interrogatories); Appendix 1.

The Second Set of Interrogatories

On May 8, 1978, Mr. Demjanjuk filed a second set of interrogatories, the first question of which asked specifically about foreign government reports regarding the activities of Ivan the Terrible at Treblinka:[543]

> Has any foreign government or agency thereof conducted an investigation and filed a report regarding the acts allegedly committed by the defendant at Treblinka?

The government did not produce, prior to 1982, the Polish Main Commission materials in response to this interrogatory. Mr. Mendelsohn did not believe that the letter he received from Dr. Pilichowski and the two articles constituted such a report.[544] Mr. Parker, on the other hand, believed that the failure to turn it over was a mistake:

> Again, I don't have any specific recollection but I think it was an oversight. I think it was responsive to the questions and I think we had an obligation to turn it over and we didn't do it.[545]

The Fourth Set of Interrogatories

On April 14, 1980, Mr. Demjanjuk filed his fourth set of interrogatories, which also contained the assertion on its face page that the intgerrogatories would be of a continuing nature, requiring supplementation of new or additional information.[546] These interrogatories addressed matters involving government witnesses expected to testify at the upcoming denaturalization trial and matters in-

---

[543] Pet. Exh. 10.

[544] See Mendelsohn testimony at 119.

[545] See Parker testimony, vol. I at 189.

[546] Pet. Exh. 30.

volving photospread identifications. The filing of this set of interrogatories prompted Mr. Moscowitz and Mr. Horrigan to conclude that Mr. Demjanjuk was setting aside Soviet witnesses as a "special class," and that responses and production with respect to these witnesses were required only if the government expected call the witnesses to testify at trial.[547]

As noted above, I have concluded that the attorneys acted in good faith in making this decision, although Judge Battisti ultimately rejected their argument on its merits. Nevertheless, several observations are in order, which I make without intending to impugn the attorney's motives.

First, the tenuity of the interpretation itself suggests that Messrs. Moscowitz and Horrigan wanted to provide the defense with as little informtion and evidence as possible. In other words, the government was playing hardball. The inference which the government attorneys drew from question 4 of the fourth set of interrogatories was not even remotely as unambiguous as Mr. Horrigan argued before Judge Battisti at the mistrial hearing.[548] Although the

---

[547] See Pet. Exh. 226 at 5-6.

[548] See Mistrial Transcript at 1501. Mr. Horrigan stated there:

Again, to the point of the fourth set of Interrogatories, in Question No. 4, there they specifically say they don't want the names of Soviet witnesses unless and until we intend to call and depose them.

In fact, the question reads:

4. Within 7 days after the expected Soviet witnesses are confirmed to be witnesses or dependents in this matter state:

(a) Each persons' name and addresses

(b) each persons' expected testimony and specificially whether or not each is an eyewitness to the allegations set forth in Counts II and/or III of plaintiff's Complaint.

(c) set forth in detail any identification procedures used in conjunction with such Soviet witnesses including:

government is certainly permitted to enjoy the benefits of the Federal Rules, the hardball approach contravened the

---

1. The specific method of identification;
2. The photos used, if any;
3. The person conducting the identification procedure; and
4. The date of the positive identification of the defendant or a suspected photo of the defendant.

(d) Is plaintiff or its agents in possession of any written statements made by any of the above mentioned persons. If so, will plaintiff attach such statements to the answers to these interrogatories.

Fourth Set of Interrogatories. See Pet. Exh. 30.

In any event, there are inferences running both ways. In Mr. Demjanjuk's third set of interrogatories, Question 12 asks:

> Of the witnesses identified by plaintiff in answer to Question #1 of the First Set of Interrogatories directed to plaintiff by defendant, state which witnesses have viewed the photograph on card #1.

See Pet. Exh. 27. The government responded with a brief list of names, including those of six survivors, and that of Otto Horn. Id. Question 15 then asks:

> State the names and addresses of any other persons who were confined at Treblinka during the years 1942-1943, other than those mentioned in interrogatory #12, that viewed the photograph on Card #1.

The government's response to this (per Mr. Parker) was: "Objection, this information is subject to the Government's investigative privilege, and irrelevant to subject matter." Id.

The government could certainly not withhold names of persons who witnessed the operations at the gas chambers, regardless of whether or not those persons claimed to have seen Mr. Demjanjuk there. Nor is there a colorable argument they could make that such persons were "irrelevant to subject matter." Their response to Question 15, therefore, could plausibly be read to suggest that their response to Question 1 of the first set provided a comprehensive list of witnesses to the acts committed at the gas chambers.

spirit, if not the letter, of the promise of cooperation they had given to the defense before Magistrate Streepy on June 4, 1979—a promise which Mr. Horrigan knew resulted from their own work product objections.

More important, in interpreting the latter interrogatory as modifying the former requests, the government attorneys exceeded their authority under the Federal Rules of Civil Procedure. Although every written sentence is subject to interpretation, it is not the task of an attorney confronted with two straightforward, unambiguous interrogatories to infer the meaning of one from the language or even the existence of the other. If, as Messrs. Moscowitz and Horrigan have argued, the interrogatory raised questions about the scope of prior requests, they had three options under the Rules. They could, first of all, have complied with both requests, despite the redundancy they perceived of the question regarding the Soviet witnesses. Alternatively, they could have complied with the first request and have sought a protective order, under Fed. R. Civ. Proc. 26 (c) with regard to the latter request, on the grounds that the latter question was oppressive because of its redundant nature. Finally, they could have taken the approach (apparently novel and untested in this litigation) of contacting the defense counsel by telephone or letter, and asking for clarification. Each of these options would have had the advantage of providing the defense either with the requested information, or with notice of the misunderstanding. Although I believe that the consequences were unintended, the course they took—silently imposing a limitation on the earlier interrogatory—almost certainly misled Messrs. Martin and Gonakis and endangered Mr. Demjanjuk's ability to mount a defense.

The Fourth Set of Interrogatories was significant in another area, as well. Question 9(a)-(b) asked the government to:

> State the names of each person who viewed either P-1 [(photospread 1)] or P-2 [(photospread 2)] and as a result positively identified a photograph suspected of being that of the defendant.[549]

Question 11 was similarly worded, but sought the names of people who had failed to identify Mr. Demjanjuk's photograph. After Mr. Moscowitz took the reigns of discovery in the denaturalization case, the government essentially treated this question as a surrogate for the general "persons known . . . to have knowledge" request which the first question of the first set posed. Thus, it is in answers to these questions that all of the Soviet witnesses names which the government provided can be found, as can that of Mr. Sztajer.[550]

Mr. Martin argued before Judge Battisti that, although the government provided him with Mr. Sztajer's name in response to this question, it was obliged to provide it to him in response to the first question of the first set, as well. Judge Battisti disregarded this argument, and concluded that the defense's lack of diligence precluded them from complaining after trial that they did not have the name.[551]

Of course, Judge Battisti's decision is the law of the case, and he was fully informed of the circumstances with respect to Mr. Sztajer. Nevertheless, this issue is important to a full explication of what went wrong in this case, and so I will provide my own observations. First, even setting

---

[549] See Pet. Exh. 30.

[550] See Pet. Exh. 30; Pet. Exh. 35; see also Appendix 1.

[551] See *United States v. Demjanjuk*, 518 F.Supp. 1362, 1386 (N.D.Ohio 1981).

aside the government's "misidentification" argument, which I have discussed above, the government's position with respect to Mr. Sztajer's name was illogical. Mr. Sztajer viewed photospreads 1 and 2, and the government provided his name in response to the fourth set of interrogatories as one who "failed to identify" four months before Mr. Sztajer submitted his affidavit to the government falsely identifying Liudas Kairys as Ivan the Terrible. At the very least, Mr. Sztajer was a person who claimed to have knowledge of the defendant's alleged acts described in the complaint. Second, although the government provided some context for Mr. Sztajer (it categorized him as a Treblinka witness, thus putting Mr. Martin on notice about Mr. Sztajer's background), the same cannot be said about the names of the Soviet witnesses. The government, thus, presented the Soviet names completely without a context in which the defense could place them.

Nor is it an adequate response for the government to argue now, as they have ever since the mistrial hearing,[552] that Mr. Demjanjuk's own failure to seek additional information is to blame. In fact, in question 1 of the first set of interrogatories, and in his request for production, Mr. Demjanjuk sought the very information which the government argues he was negligent in not requesting. It was the government's interpretation of these discovery requests which was primarily responsible for their failure to produce the information. Although it appears in retrospect that Messrs. Martin and Gonakis would have uncovered evidence now at issue had they made additional requests, it is uncharitable and more than a little ironic that government attorneys now argue that they deserve to be judged without hindsight while denying the same consideration to the former defense attorneys.

---

[552] See, for example, Mistrial Transcript at 1500.

IV. Legal Standards

A. Discovery

1. *Civil Rules*

Denaturalization is a civil proceeding governed by the Federal Rules of Civil Procedure.[553] The Rules of Civil Procedure are premised on the belief that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to litigation."[554] The Rules are written, therefore, in "broad, permissive terms,"[555] and provides litigants with powerful tools to obtain their opponent's knowledge about the case.

> Discovery may be had:
> regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claims or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.[556]

---

[553] See *Fedorenko v. United States*, 449 U.S. 490, 516 (1981); *United States v. Minerich*, 250 F.2d 721, 726 (7th Cir. 1957). Deportation proceedings, too, are civil. See *Immigration and Naturalization Service v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984).

[554] *Hickman v. Taylor*, 329 U.S. 495-507 (1947).

[555] See Fed. R. Civ. Proc. 26, Advisory Committee Notes to the 1983 amendments.

[556] Fed. R. Civ. Proc. 26(b)(1).

Although the Rules provide a powerful tool for the civil litigant, it is a tool whose utility is defined by the advocate's skill and diligence; the burden is on the litigant to make proper discovery rquests.

2. *Brady*

In *Brady v. Maryland,*[557] the Supreme Court held that the constitutional right to due process requires prosecutors to furnish exculpatory evidence to criminal defendants. The government argues in this case that Brady is limited to criminal proceedings, that no court has applied it in denaturalization cases, and that the courts have specifically ruled that it does not apply in extradition cases.[558] Mr. Demjanjuk concedes that this is the state of the case law, but advances two arguments in favor or applying Brady in this case. First, he argues that through public statements, Mr. Ryan led the public, the OSI's opponents, and the courts to believe that the OSI had a policy of following Brady in its cases. Second, he argues that I should hold that Brady applies to extradition proceedings. I disagree with the first argument but agree with the second. Nevertheless, because the government must first have had knowledge of such a requirement in order for its failure to abide by that rule to constitute fraud upon the court, my observations on the second point must remain obiter dicta, and cannot affect the outcome of these proceedings.

As for the first argument: Mr. Ryan testified that he had said many times to members of the media (and to others) that the OSI had a policy and practice of turning over

---

[557] 373 U.S. 83 (1963).

[558] See Respondent's Proposed Findings of Fact and Conclusions of Law at 71, citing *Merino v. United States Marshal*, 326 F.2d 5, 13 (9th Cir. 1963); *In re Extradition of Koskotas*, 127 F.R.D. 13, 27 (D.Mass. 1989).

exculpatory information even if it had not been requested in discovery.[559] However, although Mr. Ryan made these statements over a long period of time, he testified that he was not sure if, when, and how he communicated this policy to OSI attorneys.[560] Mr. Demjanjuk invites me to find, based solely on the fact that Mr. Ryan admitted making these statements, that the OSI actually had a policy of turning over exculpatory information, and that they violated this policy in Mr. Demjanjuk's case. I must decline the invitation, however, because such a finding contradicts every other OSI attorney's testimony, which was to the effect that there was no such policy in place.[561]

Mr. Demjanjuk's second argument is more persuasive, however.The courts that have declined to apply Brady to extradition proceedings have done so because the determination of a defendant's guilt or innocence is not made in extradition hearings.[562] It is true that extradition proceedings are limited in scope, and that because the issues before the court relate primarily to proper identification, the scope of the extradition treaty, and the existence of probable cause, discovery would generally serve little purpose. Nevertheless, I believe that this argument is flawed.

Treaties of extradition are unusual in that they permit encroachment by a foreign sovereign on the constitutional rights of residents of this country. For example, Mr.

---

[559] See Ryan testimony at 32-40.

[560] See id. at 32.

[561] See Parker testimony, vol. I at 126-28, id. vol. II at 63; Moscowitz testimony at 145-46, 152-53, 214, 261-64; Einhorn testimony at 57.

[562] See *Matter of Extradition of Singh*, 123 F.R.D. 108, 112 (D.N.J. 1987) (holding that *Brady*'s applicability to extradition proceedings is questionable).

Demjanjuk did not receive a trial by jury in Israel, a right which our Constitution guarantees to all those charged with felonies. We permit such extraconstitutional interactions with our residents out of respect for the foreign sovereign's legal processes. Extradition treaties are, therefore, based on a comity which is recognized by the President and ratified by the Senate. This comity justifies our treating extradition hearings as preliminary hearings, and entrusting the process of determining guilt or innocence to the foreign legal system.

But the respect we extend foreign legal systems is no basis for ignoring the fact that they are foreign, or for ignoring the consequences this fact has for an accused individual. Due process jurisprudence is often driven by the potential for abuse, and this case, which is in many ways unique, highlights a substantial danger. It is conceivable that a prosecutor in this country who possesses exculpatory evidence could effectively launder the evidence from a case by inducing a foreign state to seek the individual's extradition, and withholding the evidence from both the foreign state and the defendant. Thus, even if the foreign state had the equivalent of the Brady rule, they would be unable to provide it because they would themselves be ignorant of its existence. Although the Brady rule would be difficult to enforce in extradition cases, I believe that a defendant must be provided with exculptory evidence before he is extradited, not for any purpose related to the matters within the scope of the extradition hearing itself, but as a matter of due process in the international judicial system. If the government wishes to establish a free market in fugitives, they must ensure that the system they establish respects the individual rights guaranteed by the constitution.

Two things prevent me from applying these observations to this case. First, the question with respect to fraud

on the court is one of intent. Because the legal rule I discuss above is novel, the government was under no obligation to abide by its terms thirteen years ago. Second, the prosecutors in this case did not believe that they possessed and withheld exculpatory information. This knowledge is a threshold question under Brady. Therefore, although I agree with Mr. Demjanjuk that Brady should be applicable to extradition proceedings, this conclusion has no effect on this case.

B. Fraud on the Court

The Sixth Circuit's order of reference notes that Chief Judge Merritt commented during oral argument that the "bedrock question" before that Court—and therefore, before me—is whether government attorneys committed "fraud on the court" under the definition of Fed. R. Civ. Proc. 60(b).[563]

Rule 60(b) provides:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceedings for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . The motion shall be made within a reasonable time, and, for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not limit the power of a court . . . to set aside a judgment for fraud upon the court.

---

[563] See Order, *Demjanjuk v. Petrovsky, et al.*, No. 85-3435, at 1 (6th Cir. Aug. 17, 1992).

The fraud on the court provision entered the rules in the 1946 Amendments, and constitutes a codification of the Supreme Court's 1944 holding in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*[564] The rule poses a significant interpretive difficulty: if motions for relief from judgment because of fraud are subject to a one-year limitations period under 60(b), but fraud on the court actions are not so limited, how is one to distinguish between fraud and fraud upon the court?[565]

Because "preserving the finality of judgments . . . is an important legal and social interest,"[566] fraud on the court is restricted to "only the most egregious misconduct,"[567] and must involve "corruption of the judicial process."[568] Fraud on the court encompasses only "fraud which is directed to the judicial machinery itself."[569] It is limited to "very unusual cases involving 'far more than an injury to a single litigant.' "[570]

1. *Intent Element*

The government argues, based on the Ninth Circuit case of *Rozier v. Ford Motor Co.*,[571] that Mr. Demjanjuk must prove that the government attorneys engaged in "an unconscionable plan or scheme . . . designed to improperly

---

[564] 322 U.S. 238 (1944). See 21 Fed. Proc., L.Ed. § 51:170 (1984).

[565] See 21 Fed. Proc., L.Ed. § 51:171 (1984); C. Wright & A. Miller, 11 Fed. Prac. & Proc. § 2870 (1973).

[566] *Toscano v. Commissioner*, 441 F.2d 930, 934 (9th Cir. 1971).

[567] *Wilson v. Johns-Manville Sales Corp.*, 873 F.2d 869, 872 (5th Cir. 1989).

[568] *In re Met-L-Wood Corp.*, 861 F.2d 1012, 1018 (7th Cir. 1988).

[569] *Bulloch v. United States*, 763 F.2d 1115, 1121 (10th Cir. 1985) (en banc).

[570] Wright & Miller, 11 Fed. Pract. & Proc. § 2870.

[571] 573 F.2d 1332, 1338 (9th Cir. 1978).

influence the court in its decision."[572] *Rozier* relied upon another Ninth Circuit case, *England v. Doyle*,[573] which in turn purported to base this element on the *Hazel-Atlas* case.[574] The most likely source of this element in *Hazel-Atlas* is the following paragraph:

> Every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments. This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury. Here, even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals.[575]

I find this paragraph's reference to a plan or scheme to be scant support for the Ninth Circuit's conclusion. The Supreme Court's purpose in these three sentences was to draw a contrast between what we may now consider simply "fraud" in the sense meant by Rule 60(b)(3)—e.g., the spontaneous perjury of a witness without the attorney's knowledge—and fraud on the court, which *in the case before the Court* happened to manifest itself in a "deliberately planned and carefully executed scheme to defraud" the court.

The involvement of an officer of the court is a more useful distinction between the two scenarios than that which the Ninth Circuit draws. Equity abhors intentional acts of fraud on the court, committed by an officer of the

---

[572] Id.

[573] 281 F.2d 304 (9th Cir. 1960).

[574] Id. at 309.

[575] 322 U.S. at 245-46.

court, whether they are the product of deliberate planning and careful execution or the product of a brief moment of Machiavellian boldness. Therefore, I reject the *Rozier* requirement of a scheme or plan to defraud.

Mr. Demjanjuk argues that the intent element is satisfied by proof of actual intent to defraud, of wilfull blindness to the truth, or of a reckless disregard for the truth. Although his legal authorities for this proposition are merely cases drawn from the definition of fraud in other contexts, I concur with this definition. The Federal Rules of Procedure and the codes of professional responsibility establish conclusively that attorneys, as officers of the court, are proscribed from conduct that, although unintentional, wilfully remains blind to the obvious, or constitutes averments of facts or law about which the attorney is ignorant and knows of his or her ignorance.[576]

2. Nondisclosure

The parties apparently disagree that intentional nondisclosure in circumstances imposing a duty to disclose can constitute fraud on the court. The government observes that:

> Petitioner cannot succeed simply by showing that the government did not disclose information in its possession. As this and other courts have repeatedly held, "a[a]llegations of nondisclosure during pretrial discovery are not sufficient to support an action for fraud on the court." *H. K. Porter Co. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1118 (6th Cir.

---

[576] See, for example, *Cooter & Geil v. Hartmarx Corp.*, 496 U.S. 384 (1990); *Business Guides, Inc. v. Chromatic Comm'n Enter., Inc.*, 111 S.Ct. 922, 112 L.Ed. 1140 (1991) (discussing an attorney's obligation to conduct a "reasonable inquiry" under Fed. R. Civ. Proc. 11); see also Ohio Code of Prof. Resp. DR 7-106 (C)(1); id. DR 7-103(A).

> 1976); see also *Wilson v. Johns-Manville Sales Corp.*, 873 F.2d at 872, *Gleason v. Jandrucko*, 860 F.2d 556, 559-60 (2d. Cir. 1988); *Bulloch v. United States*, 763 F.2d at 1121.[577]

This observation is certainly literally correct: as the Fifth Circuit noted in *Kerwit Medical Products v. N&H Instruments, Inc.*, "[a]n attorney is to be expected to responsibly present his client's case in the light most favorable to his client, and it is not fraudulent for him to do so."[578] To disclose confidential information when under no obligation to do so would violate an attorney's duties to protect client confidences and to remain loyal to his client.

I disagree, however, with those courts which have taken this reasonable restatement of an attorney's duty of loyalty and have expanded it to exclude from the definition of fraud on the court intentional, fraudulent nondisclosure during discovery. Many of these cases can be traced to the Sixth Circuit's comment in *H.K. Porter Co., Inc. v. Goodyear Tire & Rubber Co.*,[579] quoted above. *Porter*, however, dealt primarily with the question of the quantum of proof of fraud on the court which is needed to justify further discovery, and the scope of the discovery that is permitted. The entire paragraph from which the quoted language is taken reads as follows:

> Goodyear is plainly not entitled to discovery of documents it did not request in pretrial discovery. The only documents relevant to this fraud claim are those which Goodyear requested earlier but which Porter allegedly willfully failed to produce. Goodyear

---

[577] Respondent's Proposed Findings of Fact at 62.

[578] *Kerwit Medical Prods., Inc. v. N&H Instruments, Inc.*, 616 F.2d 833, 837 (5th Cir. 1980).

[579] 536 F.2d 1115 (6th Cir. 1976).

> apparently believes that it is entitled to broader discovery so that it can fish for other documents arguably within the class of documents which it could have requested in pretrial discovery. We do not consider the granting of post-judgment discovery a proper vehicle for reviewing the integrity of pretrial discovery. Allegations of nondisclosure during pretrial discovery are not sufficient to support an action for fraud on the court.[580]

Read in its entirety, this paragraph, and the fact that the Sixth Circuit in the same opinion actually addressed Goodyear's claims of fraudulent nondisclosure on their merits, demonstrate that the oft-quoted statement from *Porter,* like that in *Kerwit Medical Products,* dealt with "mere nondisclosure." Other courts have appeared to stray from the "mere nondisclosure" formulation. In *Gleason v. Jandrucko,*[581] the Second Circuit restated the rule without this qualifier, as did the Tenth Circuit in *Bulloch v. United States.*[582]

For the record, my conclusion is that although mere nondisclosure is not enough to prove fraud on the court under Rule 60(b), intentional nondisclosure under circumstances which impose a duty of disclosure can constitute fraud. Requiring the involvement of an officer of the court in the fraud as a prerequisite to a motion under Rule 60(b) sufficiently limits the scope of the doctrine to prevent it from swallowing up the time-limited motion available for fraud in general. Furthermore, there is no rationale to justify treating intentionally fraudulent statements differently from intentionally fraudulent nondisclosures

---

[580] Id. at 1118.

[581] 860 F.2d 556 (2d Cir. 1988).

[582] 763 F.2d 1115, 1121 (10th Cir. 1985).

when one is under a duty of disclosure. To treat the situations differently is to surrender the Rule's equitable intention to the vagaries of the culprit's syntax.

3. Standard of Proof

The parties also disagree on the standard of proof required to prove fraud upon the court. The government contends that because of society's interests in the finality of judgments, Mr. Demjanjuk must show "by clear and convincing evidence that there was a fraud on the court, and all doubts must be resolved in favor of the finality of the judgment."[583] Mr. Demjanjuk concedes that the historical standard of proof in equity of allegations of fraud was the clear and convincing standard, but he argues, based on the Supreme Court's decision in the civil securities fraud case of *Herman & MacLean v. Huddleston*,[584] that the preponderance standard is appropriate when the interests of each side are balanced. Mr. Demjanjuk's argument ignores the interest of society in preserving the finality of judgments. I hold, therefore, that the standard of proof in these proceedings is clear and convincing evidence.[585]

---

[583] Respondent's Proposed Findings of Fact at 63, quoting *Bulloch*, 763 F.2d at 1121, and citing *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 395-96 (1st Cir. 1990); *Booker v. Dugger*, 825 f.2d 281, 283-83 & n.4 (11th Cir. 1987); *In re Whitney-Forbes, Inc.*, 770 F.2d 692, 698-99 (7th Cir. 1985).

[584] 459 U.S. 375 (1983).

[585] The gravity of Mr. Demjanjuk's interests was recognized in the denaturalization case, where the government was required to prove its case with "clear, unequivocal, and convincing evidence." See *United States v. Demjanjuk*, 518 F.Supp. 1362, 1363 (N.D.Ohio 1981), quoting *Fedorenko v. United States*, 448 U.S. (1981); see also *Kungys v. United States*, 485 U.S. 759 (1988).

I observe for the record that the result in this matter would be the same under either standard.

4. Elements

Thus, fraud upon the court as I have described it comprises conduct:

1. On the part of an officer of the court;
2. That is directed to the "judicial machinery itself;
3. That is intentionally false, wilfully blind to the truth, or is in reckless disregard for the truth;
4. That is a positive averment or is concealment when one is under a duty to disclose;
5. That deceives the court.

In order to establish fraud upon the court, Mr. Demjanjuk must prove these elements by clear and convincing evidence.

C. The Allegations Revisited

It is time to return to Mr. Demjanjuk's allegations of fraud upon the court, and determine if the facts have borne them out. The most expeditious approach to doing this is to state each of his allegations, and then describe the findings I have reached in the narrative section, above, with respect to each.

1. *Introduction of evidence known to be false. The Government committed this conduct in the following respect.*

   By allowing or soliciting the testimony of Otto Horn in his video deposition, knowing it to be contrary to the November 19, 1979 interview, the Government committed fraud on the court. It was well known to the Government that Horn's testimony would be given great weight by the trial judge. As is detailed in the findings of fact, Norman Moscowitz either knew, or made himself willfully blind to the reality that Horn's identification of

Demjanjuk was made only after a highly suggestive photographic display procedure. The observation made by Judge Roettger in the District Court's *Fedorenko* is equally applicable to photographic spreads shown to a former Treblinka guard as to those shown to Treblinka survivors:

"In the instant case where there is a gap of almost 35 years between the event and the witness' ability to observe the suggestive photo spreads, the photo spread should have been as clinically impartial as humanly possible to construct."

(Pet. Exh. 99, p. 906) By presenting Horn's identification testimony to the court as if it were in fact a true depiction of the circumstances under which it was made, Moscowitz committed fraud on the court.

As I have discussed,[586] I find that Norman Moscowitz in fact did not know that Otto Horn's identification of Mr. Demjanjuk's photographs proceeded in the manner described in the Garand and Dougherty reports. I disagree, therefore, with the premise of this allegation, and find it to be without merit.

2. *Introduction of evidence and making arguments to the court known to be subject to substantial question through cross examination or contradictory evidence the existence and nature of which is withheld from the adversary. The Government did this in the following respects.*

By presenting the testimony of Otto Horn without providing the Dougherty or Garand memoranda to either the court or Petitioner's counsel, the Government committed fraud on the court.

---

[586] See section II.G.4.

By presenting testimony of five Treblinka survivors and without providing the 1979 Danil'chenko statement which would have conflicted with the survivor testimony, as is stated in George Parker's February 28, 1980 memorandum, the Government committed fraud on the court.

By advancing a theory that petitioner transferred between Treblinka and Sobibor during 1942 and 1943 without providing the 1980 Soviet protocols and information given by Suchomel, as recorded in Parker's February 28, 1980 memorandum, the Government committed fraud on the court.

By presenting testimony of five Treblinka survivors without providing Petitioner with the name of Sol Lackman, the one survivor who had claimed to have seen "Ivan the Terrible" on a daily basis, and had failed to identify Demjanjuk as "Ivan," the Government committed fraud on the court.

By presenting testimony of five Treblinka survivors without providing Petitioner with the statements of Leleko or Malagon, Leleko's name, or the Soviet or Polish lists of guards, all of which suggest that a "Ivan Marczenko" and not John Demjanjuk was "Ivan the Terrible," the Government committed fraud on the court.

There are five separate allegations here, which I will deal with seriatim. The discussion above, with respect to the first numbered allegation, disposes of the allegation regarding Mr. Horn's testimony. I have also found that Messrs. Moscowitz and Horrigan believed in good faith that Mr. Demjanjuk's request for production was a "dead letter."[587] Therefore, they did not perceive themselves to be obligated to turn over to Mr. Demjanjuk the Danil-

---

[587] See sections II.J, II.M.

chenko protocols, which demonstrates that the second allegation is meritless. This disposes of the third paragraph as well, except for the allegation that the government should have turned over its information from Suchomel. I disagree with this contention also. The attorneys possessed no notes from their meeting with Suchomel, and their failure to perpetuate his testimony is excusable in light of their lack of belief that his frailty presaged his death, and their view that his information was limited.

Although I did not discuss it in connection with the narrative, I find that the government's failure to provide the name of Sol Lackman as a nonidentifying witness was inadvertent, and does not constitute fraud upon the court.[588] During the discovery process, the government disclosed the names of twelve Treblinka survivors who failed to identify Mr. Demjanjuk's photographs. Among these were three who worked in Camp 2 near the gas chambers (Messrs. Helman, Sztajer, and Czechowicz) and one who saw Ivan Grozny pass through the lower camp every day (Mr. Goldberg).[589] The government also disclosed the names of two German SS officers (Franz and Suchomel) and one Treblinka guard (Malagon) who failed to identify Mr. Demjanjuk.[590] In addition, the government attorneys gave Mr. Demjanjuk the names of nine survivors from Sobibor and Flossenberg who failed to identify him.[591] As evidenced by these broad disclosures,

---

[588] Sol Lackman was a survivor of the lower camp who had "never been in the high camp where the gas chambers were located." Pet. Exh. 257. Although Mr. Lackman knew of a Ukrainian guard nicknamed Ivan Grozny, he was unable to identify Mr. Demjanjuk's photographs.

[589] See Resp. Exhs. 90-91, 97-98, 12, 118.

[590] See Pet. Exh. 30.

[591] Id.

it is apparent that the government did not intend to withhold Mr. Lackman's name, and there is no conclusion but that their failure to disclose it was inadvertent.

The limited understanding Mr. Moscowitz and Mr. Horrigan had of Mr. Demjanjuk's request for production also disposes of the allegations of the final paragraph.

3. *Making promises of compromise over discovery procedures (in the sense meant by* Throckmorton*)—promises which are not kept. The Government did this in the following respects.*

The Government committed this conduct by telling the court and Petitioner in correspondence, and implicitly in oral argument, that it had turned over all relevant requested material, by sending copies of discovery correspondence to the court implying that it had made searches it had not made, by assuring the defense that it would use its unique access to foreign evidence to ensure that the defense received material requested and which the Government was required to provide but did not provide.

By representing to the court and Petitioner by letter and in colloquy at the mistrial proceeding that it had turned over the information from Dorofeev and the other 1980 statements in order to make the record of discovery complete. (Horrigan Tr. 1505, where Mr. Horrigan stated "after reviewing the information [the 1980 protocols], we decided it's in our best interests, [to produce the information].") This suggested to the defense that the 1980 protocols were the only Soviet statements in the Government's possession relevant to the Demjanjuk case. This representation was a promise of compromise—

a confession that such discoverable material to which the defense was entitled should and would be turned over without resort to additional motions to compel. This was a false promise because the Government did not turn over information concerning other more significant Soviet protocols.

By creating a policy under Allan Ryan that OSI would turn over all exculpatory information, whether called for under the civil rules or not, and publicly stating that policy, the Government misled opposing counsel, violated its own policy and committed fraud on the court.

These allegations have all been discussed in the context of the narrative, or in the discussion of the first two sets of allegations. They are without merit.

4. *False representations to the court concerning the evidence in its possession, evidence turned over to the adversary, or the reliability of evidence presented. The Government committed this conduct in the following respects.*

By representing by letter in March, 1981 that it was turning over detailed information from statements obtained from the Soviet Union (and later the 1980 protocols themselves) in order to make the record of discovery "complete", and simultaneously retaining and not turning over much more important potentially exculpatory information and statements, the Government committed fraud on the court.

By arguing at the May 4, 1981 mistrial hearing that Petitioner was not entitled to relief because he was unable to demonstrate prejudice from the late disclosure of the 1980 protocols, while simultaneously retaining and not turning over Soviet state-

ments (Leleko and Malagon) from which Petitioner could have demonstrated prejudice, the Government committed fraud on the court.

By representing to the court and John Martin by letter while Petitioner's case was pending before the Supreme Court that all discoverable material had been produced, without actually making the efforts necessary to verify that all discoverable materials had actually been produced, the Government committed fraud on the court.

Although these allegations are discussed above, one observation is in order. Mr. Moscowitz's letter of March, 1981, stating that he was turning over the names in order to make the record of discovery complete, does not suggest that he believed the government to be under any obligation to turn the statements themselves over to Mr. Demjanjuk. It was only when Judge Battisti ordered the government to produce the statements during the mistrial hearing that the government did so. In light of the government's understanding, the letter supplemented the government's disclosure of the names of persons who had viewed photospreads containing Mr. Demjanjuk's photograph.

5. *Possession of exculpatory evidence while arguments were made as to admissibility of directly related evidence, and failing to turn over the exculpatory evidence possessed, the Government committed this conduct in the following respects.*

The Government had the Malagon and Leleko statements—statements which were called for in discovery and which clearly had exculpatory potential—in Cleveland during the trial and mistrial proceedings and never turned them over or brought them to the court's attention.

The Government had the 1979 Danil'chenko statement in its possession when it objected on

hearsay grounds to similar information found in newspapers and magazine articles being entered into evidence. (Pet. Exhs. 191, 192, 217) It did this even though it knew that the objected-to articles were a perfectly accurate account of the 1979 statement. By invoking the hearsay objection the Government necessarily wanted the court to believe that the recounting of the Danil'chenko statement in the news articles was an untrustworthy account, even though it knew the contrary to be the truth. This was fraud on the court.

These allegations are all discussed above, with the exception of Mr. Demjanjuk's argument that the government's objection to the Danilchenko statements in newspaper articles was in bad faith. There is nothing in the record to support this inference. Merely because evidence is exculpatory (which Danilchenko's statements were not, in the context of the denaturalization hearing) does not mean that it is also admissible. The government has the right to the benefits of the Federal Rules of Evidence, and may seek to exclude hearsay if it wishes.

6. *Failing to continue to scrutinize the flaws in the case while it progressed through the appellate courts to the Supreme Court of the United States, the Government committed fraud on the court. The Government committed this conduct in the following respects.*

Where the Solicitor General of the United States has responsibility for the Government's position, the courts rightly have a reasonable expectation that the United States will maintain a continuing scrutiny of the law and evidence, and promptly confess error if the situation warrants it.

By allowing the case to go before the appellate courts and the Supreme Court of the United States with knowledge that the record was incomplete, and with knowledge that all relevant material to which the defense was entitled had not been turned over, the Government committed fraud on the court.

The allegation contained in the second paragraph is based on an erroneous premise: government attorneys did not, in fact possess "knowledge that the record was incomplete." To the contrary, they had a good faith belief that they had met their discovery obligations. This allegation is groundless.

7. *Adding inconsistent charges to the complaint with knowledge that they were inconsistent and proceeding with the litigation as if they were consistent. The Government committed this conduct in the following respects.*

By amending the complaint on the eve of trial to add the Sobibor charge after being told in Parker's February 28, 1980 memorandum that such an action would constitute a "ruse" on the court, the Government committed fraud on the court. It did this even though much of the evidence which led Parker to conclude that the two lines of evidence were irreconcilable (Demjanjuk's name not on the Polish or Soviet lists, the 1979 Danil'chenko statement and the information supplied by Suchomel) was not turned over to the defense.

This allegation is discussed and found meritless in the narrative portion of this Report.[592]

---

[592] See section II.K.

V. Conclusion

Ultimately, this is a case about questions that were never asked, and questions asked that went unanswered. Government attorneys failed to ask questions regarding the evidence they possessed, and this error prevented them from asking questions designed to obtain additional evidence.

Government attorneys failed to challenge the evidence they possessed, and this led them to abandon leads which contradicted their interpretation of the evidence. Two examples tell this story plainly. As I discuss above, George Parker never believed that the Leleko protocol related to Mr. Demjanjuk. In retrospect, this is an astonishing claim, yet the proof on this point is quite compelling. How, then, could he have interpreted the statement, describing "MARCHENKO and Nickolay, the motorists of the gas chambers"[593] as not relating to Ivan the Terrible? Because his predisposition at that time—the summer or early fall of 1979—was that Mr. Demjanjuk was Ivan the Terrible, and the Leleko statement, which doesn't refer to Ivan's notorious acts, provided nothing to connect the two names with either Ivan the Terrible or Ivan Demjanjuk. Apparently, the concept of two and only two "motorists" was insufficiently settled in his mind at that point for it to cause him concern.

Similarly, of the four theories Norman Moscowitz pursued to explain the Leleko and Malagon statements, the premise of three was that Mr. Demjanjuk was Ivan the Terrible. Mr. Moscowitz came the closest of any government attorney to unraveling the mystery when he tried to get Allan Ryan, Jr., to ask Soviet officials for statements containing the name of "Ivan Marchenko or the Ivan who

---

[593] See Pet. Exh. 149K; sections II.E. II.I.1.

worked at the gas chambers."[594] But even this attempt, as I have discussed above, was premised largely on Mr. Moscowitz's belief that the eyewitnesses' identifications were accurate, and that Mr. Demjanjuk had used an alias while working at Treblinka.

Thus, the government was inadequately skeptical of its theory to begin with, and this shortcoming was compounded by the unintended silencing of the lone dissenting voice—Mr. Parker's. If Mr. Ryan and Mr. Moscowitz had received and read his February 26, 1980, memorandum, the latent suspicions about the case may have been resolved in the light of day. Mr. Parker had believed that they understood the gravity of his feelings about the case, and this misunderstanding eventually resulted in his resignation.

In scientific terms, the prosecutors never attempted to prove the null hypothesis—an alternative hypothesis which is the converse of that in which one believes. In the Demjanjuk case, attempting to prove the null hypothesis would have led the government investigators and attorneys to look for evidence that *someone other than John Demjanjuk* was Ivan the Terrible. Ironically, Allan Ryan, Jr., described this process in his book *Quiet Neighbors,* in describing the reinvestigation of the case of Frank Walus:

> My aim was to follow two distinct lines of investigation: first, to reexamine the existing evidence, both the prosecution and defense; second, to search for any new evidence that would shed light on the truth.[595]

In retrospect, the Walus reinvestigation worked because it began by accepting the premse that Walus was *not* a mem-

---

[594] Pet. Exh. 221.

[595] Allan Ryan, Jr., *Quiet Neighbors* 215 (1984).

ber of the Gestapo in Kielce and Czestochowa.[596]

As I discuss above, the Federal Rules of Civil Procedure provide powerful tools,[597] but the civil litigant is the only one who can wield them. Mr. Demjanjuk's defense attorneys did not adequately pursue every lead the government's responses provided, and they, too, are responsible for the outcome of discovery in the denaturalization case.

In addition, the case is about questions asked that went unanswered. As I have discussed above, a careful reading of Mr. Demjanjuk's discovery requests demonstrates that he asked for virtually every piece of evidence that is at issue in these proceedings. As demonstrated, the government did not provide the evidence because it believed that it was under no duty to do so. The heart of the discovery problems, therefore, was a tragic misunderstanding.

I have fixed the responsibility for this on the government, but this case is more about imperfection than perfidy to justice.[598] I trace the root of the misunderstanding to the unstable and fractious character of the prosecution team. Between the denaturalization complaint's filing in August, 1977, and the close of discovery before the beginning of the trial in February, 1981—approximately thirty

---

[596] And because Mr. Walus's alibi was truthful.

[597] See section IV.A.1.

[598] One participant who must not remain blameless is Mr. Demjanjuk himself. Mr. Demjanjuk's alibi was so incredible as to legitimately raise the suspicions of his prosecutors that he lied about everything—including his denial that he was Ivan the Terrible. The principal effect of this lie, therefore, was merely to confirm the prosecutor's suspicions that they were on the right trail. Mr. Demjanjuk may have been well-advised to heed Abraham Lincoln's admonition:

> In law it is good policy to never plead what you need not, lest you oblige yourself to prove what you can not.

Abraham Lincoln, Letter to Usher F. Linder, February 28, 1848. As this case demonstrates, the same can be said of equity.

months—no fewer than eight government attorneys worked on the Demjanjuk case.[599] During much of this period, relations between the two staffs were hostile. It appears that Mr. Horrigan and Mr. Moscowitz first bridged this chasm when they began to cooperate with one another at about the time of the Otto Horn video deposition. By then, however, the discovery was well-advanced and trial was only a year away.

These difficulties were only compounded, however, by the attitude the trial attorneys took toward discovery; an attitude that at times bordered on gamesmanship.

The proceedings on the collateral consequences of the denaturalization trial—Mr. Demjanjuk's deportation and his extradition to Israel—also suffered from inconstancy and poor communication. As discussed above, the communication problems over extradition existed even before the beginning of the denaturalization trial: none of the line attorneys developing the case understood that extradition was a significant option. In addition, even before the Supreme Court denied Mr. Demjanjuk's petition for certiorari from the Sixth Circuit's decision affirming his denaturalization, the attorneys who actually worked on the denaturalization had left, and Judge Einhorn took their places.

As discussed, the OSI's cooperation with the government of Israel was characterized by an unintentional failure to completely disclose the materials they had acquired regarding Mr. Demjanjuk's case. Upon the filing of the FOIA requests, the Office, which feared that its failure to provide Israel with Soviet materials would be perceived as a lack of candor, and also feared disclosing the fact of

---

[599] Messrs. Cipollone, Horrigan, and McLaughlin with the U.S. Attorney's office; Messrs. Couvillon, Thirolf, Mendelsohn, Parker, and Moscowitz for the SLU and its successor, the OSI.

its cooperation with that government, denied Mr. Demjanjuk's supporters access to materials that would have been helpful to his defense to the criminal charges against him.

There is much to lament in this story. The government should attempt to ensure that its intramural disputes do not harm those against whom it litigates. It should attempt to ensure that its institutional memory is consistent and reliable. The government, however, is actually composed of individuals, and only individuals may intend the consequences of their actions, or behave recklessly, or behave with wilfull blindness. Only culpable individuals may commit fraud upon the court.

The individuals who composed the team which prosecuted Mr. Demjanjuk acted in good faith. They did not intend to violate the Rules or their ethical obligations. They were not reckless; they did not misstate facts or the law as they understood them, and did not make statements in ignorance while aware of their ignorance. Although they were blinded to what we may now perceive to be the truth, they were not wilfully blind.

Moreover, each of the attorneys involved—even those who believed that these proceedings were without foundation or jurisdiction—have cooperated fully in this investigation. I believe that they testified truthfully, and that they are now, and were then, principled, albeit fallible.

What, then, of Mr. Demjanjuk? Although the Sixth Circuit's order characterized the question as whether the government attorneys committed fraud upon the court, it is conceivable that Mr. Demjanjuk may seek additional extraordinary relief from these judgments in the future. For this reason, I feel that it is best that I make the following observations.

The Soviet evidence, viewed in its entirety, casts a substantial doubt on Mr. Demjanjuk's factual guilt of the

central allegation of the denaturalization complaint – that he was Ivan the Terrible of the Treblinka gas chambers. The statements of former Treblinka guards and laborers recently obtained from the Soviet Union constitute an harmonious chorus which inculpate a man named Ivan Marchenko as the Ivan who worked at the gas chambers, and thus exculpate Mr. Demjanjuk from those specific crimes. Given the period of time over which the Soviet statements were made (many were made in the 1940s, others were made as recently as the 1970s), and given the lack of contact these individuals had with Jewish survivors of the death camp, the stories they tell are eerily similar, with one exception: the former Soviet guards identify Ivan Marchenko as one of the motorists of the gas chambers. There is also substantial evidence placing Ivan Marchenko at Treblinka continuously until its liquidation in November, 1943, contradicting the entry on Mr. Demjanjuk's Trawniki identification card, which indicates that he was posted to Sobibor in March, 1943.

Perhaps the most significant statement in the new Soviet evidence is that of Nikolai Shalayev, a confessed motorist of the gas chambers.[600] Shalayev confirms that only two Ukrainians worked at the gas chambers, and identifies his partner as Ivan Marchenko:

> I, together with Marchenko, Ivan was stationed at the motor which fed exhaust gas into the gas chambers into which 50 condemned Jews were herded.[601]

---

[600] An interesting point about Shalayev is that "Kolka," the name given by several people identifying Ivan's partner at the gas chambers, is a nickname for Nikolai. See, for example, Pet. Exh. 76A (Mr. Parker's notes).

[601] See Petitioner's Appendix to the Sixth Circuit brief, at 366 (statement of November 27, 1950).

> Serving as a wachman in this camp I guarded the outside of the camp and afterwards I was assigned as motorist of the "dushehubka". Marchenko, Ivan worked together with me as motorist.[602]
>
> I together with Ivan Marchenko, two Germans and two Jews, was at the motor which produced the exhaust gas which was fed into the chambers of the gas chamber.[603]
>
> In the bath house (banya) where the engine room was located, there were with me, two Jews, two Germans and one more (Soviet) citizen, a Ukrainian who along with me, guarded the Jews and supervised their work.[604]

These statements, coming from someone who worked alongside Ivan of the gas chambers as a peer, and those of many other Soviet witnesses, all cast doubt on the allegations that there were two Ivans working at the gas chambers, or that Mr. Demjanjuk worked there.

What is particularly telling about this evidence is that it provides no corroboration for the key elements of the government's theory in the denaturalization trial. For example, there are no additional witnesses naming Mr. Demjanjuk as a motorist of the gas chambers. Nor do the statements provide any support for the transfers of the sort Mr. Moscowitz hypothesized could explain the evidence. As Mr. Parker observed, the evidence in 1980 suggested that there were two roads, one leading toward the Treblinka gas chambers, the other toward Treblinka. The road to the Treblinka gas chambers is not developed at all by the new

---

[602] Id. at 367 (statement of December 8, 1950).

[603] Id. at 369 (statement of December 18, 1950).

[604] Id. at 368 (statement of December 20, 1950).

Soviet evidence, and the evidence's silence on the question of his presence at the gas chambers speaks loudest of all.[605]

Nothing uncovered in these proceedings, or, indeed, in the twelve years since Judge Battisti's decision in the denaturalization case, has cast any substantial doubt on his finding that Mr. Demjanjuk served in the German SS at the Trawniki training camp. There is simply no new evidence to refute the authenticity of the Trawniki documents, or the veracity or credibility of Mr. Schaefer, the *volksdeutsche* paymaster at Trawniki who authenticated the signatures written upon them. Despite the recent collapse of the Soviet Union, there has been no evidence from that country that its former government forged the documents in order to incriminate falsely a Ukrainian emigré, as Mr. Demjanjuk and his supporters have alleged throughout the litigation against him. Because the Trawniki allegations formed an independent ground for Mr. Demjanjuk's denaturalization and deportation, therefore, the judgment was, and is, a sound one.

VI. Recommendations

For the reasons discussed in this Report, my recommendation to the Court is that the case of *Demjanjuk v. Petrovsky, et al.* be closed, and that no action be taken against any of the government attorneys who prosecuted Mr. Demjanjuk.

Respectfully Submitted,

/s/ Thomas A. Wiseman, Jr.

THOMAS A. WISEMAN, JR.
Special Master

---

[605] The government has argued that some of the new evidence supports Mr. Demjanjuk's presence at Treblinka. This may be true, but it does not support his presence at the Treblinka gas chambers.

I HEREBY CERTIFY that copies of the Report of the Special Master were this day served upon the following:

Leonard Green, Clerk
Sixth Circuit Court of
Appeals
538 U.S. Courthouse
Cincinnati, OH 45202

Patty M. Stemler, Chief
Appellate Sec., Crim. Div.
Department of Justice
Rm 2266, 10th & Penn., NW
Washington, D.C. 20530

Dick Glovsky
Glovsky & Assoc.
31 Milk Street
Boston, MA 02109

John Horrigan
2500 Terminal Tower
Cleveland, OH 44113

Martin Mendelsohn
Halprin, Mendelsohn, et al.
901 15th St., NW
Washington, D.C. 20005

Charles Goodell
Goodell, Devries, Leech & Gray
1 South Street, #2000
Baltimore, MD 21202

Honorable Gilbert S. Merritt
Chief U.S. Circuit Judge
303 Customs House
701 Broadway
Nashville, TN 37203

Edward F. Marek
Federal Public Defender
Skylight Office Tower
1660 West 2nd, #750
Cleveland, OH 44113

Jeffrey Mausner
Berman, Blanhard, Mausner,
et al.
4727 Wilshire Blvd., #500
Los Angeles, CA 90010

James F. Burke
Burke, Kainski, & Assoc.
One Cascade Plaza
Akron, OH 44308-1111

Gerald J. Houlihan
Greenberg, Traurig,
Hoffman, et al.
1221 Brickell Avenue
Miami, FL 33131

/s/Thomas A Wiseman, Jr.
THOMAS A. WISEMAN, JR.
Special Master

Summary of Selected Interrogatories
in the Demjanjuk Denaturalization Case

[PETITIONER'S] FIRST SET OF INTERROGATORIES DIRECTED TO PLAINTIFF AND [GOVERNMENT'S] ANSWERS THERETO

Question #1: State the name and last known address of every person known to the United States Attorney for the Northern District of Ohio, Eastern Division, or his agents, employees, or representatives who claim to have any knowledge of the alleged actions of the defendant alleged in Counts I through VI of plaintiff's complaint.

Government's First Response: 1-24-78; Signed by Joseph Cipollone (P3)

1. Abraham Goldfarb
Petach Tiqua, Jehuda Halevi 7, Israel
2. Eugen Turowski
Bath Yam, Habistadrut 4, Israel
3. Elijah Rosenberg
Bath Yam Gdud Haiwri 15, Israel
4. Josef Czarny
Ramat Aviv, Brodetzkistr 42, Israel
5. Gustaw Boraks
Haifs, Achas-Str. 1, Israel
6. Abraham Lindwasser
Kiron, Zahalstr. 27 (150), Israel
7. Schlomo Helman
Tel Aviv, Jechaskiel 36, Israel

Government's Second Response: 11-26-79; Signed by Martin Mendelsohn (P19)

1. Pinchas Epstein
Shikun Achdut 62, Petach Tikva, Israel

2. Kurt Franz
Remscheid-Luettinghausen, Penal Istitution, West Germany
3. Richard Glazar
Burgfeldermattweg 18, 4123 Allschwill, Switzerland
4. Martin Kolar
Salame Street 18, Israeli Police Headquarters; Yaffo, Israel
5. Sonia Lewkowicz
Hacherman 13, Ramat Hanasi; Bat Yam, Israel
6. Jakob Szmulowicz
Guatamala 6; Jerusalem, Israel
7. Shalom Kohn
Haroestr 73, Ramat Gan, Israel
8. Gerald Kravchuk
Cleveland, Ohio
9. Georg Rajgrodzki
Keltenweg 89, Kaiserslautern, West Germany

Government's Third Response: 12-4-79; Signed by Mendelsohn (P20)

Leo Curry
8404 Jeb Stuart Road; Rockville, Maryland

Government's Fourth Response: 12-21-79; Signed by Mendelsohn (P21)

1. Franz Suchomel
Muehldorferstrasse 61, Altoetting, West Germany
2. Otto Horn
Yorckstr. 56, 1000 Berlin 61; West Berlin Germany

Government's Fifth Response: 12-27-79; Signed by Mendelsohn (P22)

Harold Henrikson
10546 Burbank Blvd.; North Hollywood, California

Government's Sixth Response: 1-80; Signed by Norman Moscowitz (P23)

Samuel Goldberg
Miami Beach, Florida

Government's Seventh Response: 2-21-80; Signed by George Parker (P26)

1. Moses Rappaport
2-36 27th Street; Fairlawn, New Jersey
2. Edward Goldstein
31-65 138th Street, Apt. 5k; Flushing, New York

Government's Eighth Response: 3-80; George Parker (P28)

1. Mayer Zigelman
97-16 65th Road; Rego Park, New York
2. Henry Brenner
1617 55th Street; Brooklyn, New York
3. Chil Rajchman
Rambla Armenia, 3883 Apt. 402;
Montevideo, Uruguay

Question #2: With respect to each person identified in the answer to the previous interrogatory, state:

a. Whether a statement was obtained from each or any the persons by the United States Attorney for the Northern District of Ohio, Eastern Division, his agents, employees, representative, or any other government official or representative thereof.

Government's First Response: (P3)

A statement was obtained from each person identified in answer to the previous interrogatories (Question #1, First response).

Goverment's Second Response: (P19)

Statements were obtained from the following individuals by the Israeli police: Pinchas Epstein, Shalom Kohn, Sonia Lewkowicz, George Ragrodzki.

A statement was obtained from Gerald Kravchuk by the U.S. Department of Justice.

Government's Third Response: 1-80; Signed by Moscowitz (P23)

No statement was obtained.

Government's Fourth Response: 2-21-80; Signed by George Parker (P26)

No statement was obtained.

Government's Sixth Response: 3-80; George Parker (P28)

Rajchman – Yes

b. If any such statement was obtained, the date upon which it was obtained.

Government's First Response (P3)

1. Abraham Goldfarb, 5-9-76
2. Eugen Turowski, 5-10-76
3. Elijah Rosenberg, 5-11-76
4. Josef Czarny, 9-21-76
5. Gustow Boraks, 9-30-76
6. Abraham Lindwasser, 10-3-76
7. Schlomo Helman, 9-28-76

Government's Second Response (P19)

1. Gustaw Boraks, 3-15-61
2. Pinchas Epstein, 6-7-60, 6-13-61, 3-9-78
3. Abraham Goldfarb, 6-14-60
4. Shalom Kohn, 6-7-76
5. Gerald Krauchuk, 3-7-79
6. Sonia Lewkowicz, 6-23-60, 3-15-78
7. Georg Rajgrodzki, 5-24-78
8. Eliahu Rosenberg, 2-11-61
9. Jakob Szmulowicz, 3-9-78

Governmen't Third Response: 3-80; George Parker (P28)

Chil Rajchman, 11-25-45

c. If any such statement was obtained, whether the statement was written, electronically recorded, or stenographically recorded.

Government's First Response (P3)

The statement of each of the identified persons was obtained in writing in German, translated into English, and typewritten.

Government's Second Response (P19)

The Israeli Police summarized their interviews with individuals which were typed and then signed by individuals. The interview with Kravchuk was stenographically recorded.

d. If any such statement was obtained, the name and address of the person now having custody and control thereof.

Government's First Response (P3)

Only typewritten copies are in the possession of Joseph A. Cipollone, AUSA, U.S. Attorney's Office, Cleveland, Ohio.

Government's Second Response (P19)

Typewritten copies of these summaries statements are in the possession of Martin Mendelsohn, Esq.

Question #3: State the name, last known address, birth dates, and birthplaces of each person who the United States Attorney for the Northern District of Ohio, Easten Division, expects to call as a witness at the trial of this case.

Government's First Response (P3)

1. Abraham Goldfarb
Petach Tiqua, Jehua Halevi 7, Israel
DOB: 10-7-09
POB: Unknown
2. Eugewn Turowski
Bath Yam, Hahistradurt 4, Israel
DOB: 1-14-14
POB: Unknown
3. Elijahu Rosenberg
Bath Yam Gdud Haiwri 15, Israel
DOB: 5-20-21
POB: Unknown
4. Josef Czarny
Ramat Aviv, Brodetzkistr 42, Israel
DOB: 7-26-26
POB: Unknown
5. Gustaw Boraks
Haifa, Achas-Str. 1, Israel
DOB: 1-1-01
POB: Unknown

6. Abraham Lindwasser
Kiron, Zahalstr. 27 (150), Israel
DOB: 4-2-19
POB: Unknown
7. Schlomo Helman
Tel Aviv, Jechaskiel 36, Israel
DOB: 3-13-07
POB: Unknown

Government's Second Response (P19)

It has not been determined which of the individuals mentioned in answer 1 and 2 will be called as witnesses. However, Abraham Lindwasser, is now deceased.

Government's Third Response: 1-80; Signed by Moscowitz (P23)

1. Pinchas Epstein
2. Sonia Lewkowicz
3. Eliahu Rosenberg
4. Leo Curry
Rockville, Maryland
5. Harold Henrikson
North Hollywood, California
6. Sergeant Martin Kolar
Israeli Police; Jaffo, Israel

Government's Fourth Response: 3-80; George Parker (P28)

1. Abraham Goldfarb
POB: Szczucin/ Kreis Bialystok, Poland
2. Eugen Turowski
POB: Lodz, Poland
3. Elijahu Rosenberg
POB: Warsaw, Poland

4. Josef Czarny
POB: Wielun, Poland
5. Gustaw Boraks
POB: Wielin, Poland
6. Shlomo Helman
POB: Warsaw, Poland
7. Georg Rajgrodzki
DOB: 9-23-09
POB: Parczewo, Poland
8. Heinrich Schaefer
9. Eliahu Epstein
DOB: 3-15-25
POB: Czestochowa, Poland
10. Otto Horn
Yorkstrasse 66, 1000 Berlin 61, West Germany
11. Leo Curry
DOB: 6-24-19
POB: Washington, D.C.
12. Harold Henrikson
DOB: 7-15-17
POB: Arma, Kansas
13. Sergeant Martin Kolar
DOB: still unknown
POB: Czechoslavia
14. Sonia Lewkowicz
DOB: 1922
POB: Czestochowa, Poland
15. Mayer Zigelman
DOB: 11-25
POB: Czestochowa, Poland
16. Chil Rajchman
DOB: 6-14-14
POB: Lodz, Poland

Government's Fifth Response: 4-21-83; Signed by Moscowitz (P31)

Karl Streibel
Eilbeker Weg 102, Hamburg 22
DOB: 11-10-03
POB: Neustadt, Upper Silesia

Question #4: With respect to each person identified in the previous answer, state briefly, the expected testimony of each and specifically whether or not such witness is an eye witness to the actions alleged in Counts II and III of plaintiff's complaint.

Government's First Response (P3)

Each person, identified in the previous answer, is an eyewitness to some or all of the actions alleged in Counts II and III, and it is expected that they will testify to the events and occurrences described in Counts II and III.

Government's Second Response (P19)

While it cannot now be answered which of the above named individuals, along with those originally named, will be witnesses, those named additionally are eyewitnesses to some or all of the events and occurrences alleged in the Complaint.

Government's Third Response: 1-80; Signed by Moscowitz (P23)

1. Sonia Lewkowicz, Eliahu Rosenberg, and Pinchas Epstein are eyewitnesses to actions alleged in Counts II and III of the complaint and will testify concerning Treblinka and events which occurred there.

2. Harold Henrikson was the vice consul with the U.S. State Department in Ludwigsburg who approved defendant's application for a visa to the United States. He will testify concerning his processing of the visa application.
3. Leo Curry was a case analyst with the U.S. Displaced Persons Commission. He prepared the D.P. Report of the defendant. He will testify concerning the processing of the applicant by the D.P. Commission.
4. Sergeant Kolar will testify concerning the investigation of the case.

Government's Fourth Response: 3-80; George Parker (P28)

1. Otto Horn will testify as to operations at Treblinka . . . He will identify defendant from photospread as a Ukrainian who worked at death camp.
2. Heinrich Schaefer will testify as to operations at Trawniki Training Camp. He will identify signatures on Trawniki signature cards as those of Streibel and Teufel.
3. Chil Rajchman and Mayer Zigelman will testify as to operations at Treblinka . . . and their function. Each will identify defendant as a Ukrainian who worked at the death camp from a photospread.

Government's Fifth Response: 4-21-83; Signed by Moscowitz (P31; R52)

Streibel will testify concerning recruitment of guards to Trawniki, assignments and transfers to the camps, the operation of Trawniki and [matter] concerning Trawniki Training Cards.

Question #5: State the name of each potential witness identified in Answer #3 who has previously testified in another denaturalization or deportation proceeding, or before the Congress or members thereof, or any other federal agency, in the United States, or in any war criminal trial outside of the United States.

Government's First Response (P3)

None

Government's Second Response (P19)

The following eyewitnesses have previously testified:

1. Gustaw Boraks
2. Joseph Czarny
3. Pinchas Epstein
4. Kurt Franz
5. Richard Glazar
6. Abraham Goldfarb
7. Schlomo Helman
8. Sonia Lewkowicz
9. Georg Rajgrodzki
10. Eliahu Rosenberg
11. Eugen Torowski

Government's Third Response: 1-80; Signed by Moscowitz (P23)

In addition . . ., Sergeant Kolar testified in *United States v. Fedorenko.*

Government's Fourth Response: 3-80; George Parker (P28)

Otto Horn, Heinrich Schaefer, Mayer Zigelman, and Chil Rajchman

Question #6: With respect to each person identified in the previous answer, state:

a. The name or title of such proceeding or hearing.

Government's First Response (P3)

None

Government's Second Response (P19)

United States v. Fedorenko

1. Gustaw Boraks
2. Joseph Czarny
3. Pinchas Epstein
4. Sonia Lewkowicz
5. Eugen Turowski

The Trial of Kurt Franz, et al.

1. Gustaw Boraks
2. Joseph Czarny
3. Pinchas Epstein
4. Kurt Franz
5. Abraham Goldfarb
6. Schlomo Helman
7. Sonia Lewkowicz
8. Georg Rajgrodzki
9. Eliahu Rosenberg
10. Eugen Turowski

The Trial of Franz Stangl

1. Pinchas Epstein
2. Sonia Lewkowicz

Government's Third Response: 3-80; George Parker (P28)

Otto Horn, Chil Rajchman, and Mayer Zigelman – *The Trial of Kurt Franz, et al.*

Heinrich Schaefer – *The Trial of Karl Streibel, et al.*

b. The date of such proceeding or hearing and before which body such hearing or proceeding took place.

Government's First Response (P3)

None

Government's Second Response (P19)

Trial of Kurt Franz, et al.
District Court, Dusseldorf, Germany 1964-1965

Trial of Franz Stangl
District Court, Dusseldorf, Germany 1970.

United States v. Federenko
Southern District of Florida 1978

Government's Third Response: 3-80; George Parker (P28)

The Trial of Kurt Franz, et al.
District Court of Dusseldorf, Germany, 1954-1965

The Trial of Karl Streibel, et al.
District Court, Hamburg, Germany, 1972-1973

c. The substance of such witness' testimony at such proceeding or hearing.

Government's First Response (P3)

None

Government's Second Response (P19)

> Each witness provided testimony concerning, generally the Treblinka camp and events and occurrences in which the respective defendants were involved.

Government's Third Response: 3-80; George Parker (P28)

> Otto Horn, Chil Rajchman, and Mayer Zigelman – Operations at Treblinka camp, his functions and those of others at the camp.
>
> Heinrich Schaefer – Operations at Trawniki . . ., and his responsibilities . . .

d. Who is in the custody or control of the transcript of such witness' testimony at such proceeding or hearing.

Government's First Response (P3)

> None

Government's Second Response (P19)

> To the best of our knowledge, no verbatim transcript of witness testimony is made by German Courts, although the court does prepare a summary of the testimony. Such summaries, if they are preserved, would be in the hands of German authorities. The record in United States v. Fedorenko is currently held by Brian Gilda, Esq.

e. Does the United States Attorney for the Northern District of Ohio, Eastern Division, have in his custody or control the transcript of such witness' testimony at such proceeding or hearing. If so, state which witness' transcripts are in his possession.

Government's First Response (P3)

None

Government's Second Response (P19)

The Office of Special Investigations has in its possession a copy of the Fedorenko trial proceeding.

[PETITIONER'S] SECOND SET OF INTERROGATORIES DIRECTED TO PLAINTIFF AND [GOVERNMENT'S] ANSWERS THERETO

Question #1: Has any foreign government or agency thereof conducted an investigation and filed a report regarding the acts allegedly committed by the defendant at Treblinka?

Government's First Response: 5-8-78; Signed by Cipollone (P10)

Not to my knowledge

Government's Second Response: 2-21-80; Signed by George Parker (P26)

Yes.

Question #2: If the answer to [Question #]1 is in the affirmative, state what foreign government or agency.

Government's First Response: 5-8-78; Signed by Cipollone (P10)

No answer required.

Government's Second Response: 2-21-80; Signed by George Parker (P26)

The U.S.S.R. has conducted an investigation regarding defendant.

Question #3: If the answer to [Question #]1 is in the affirmative, state whether the U.S. Attorney for the Northern District of Ohio, Eastern Division, has in his custody or control a copy of such investigative report.

Government's First Response: 5-8-78; Signed by Cipollone (P10)

No answer required.

Government's Second Response: 2-21-80; Signed by George Parker (P26)

No report filed.

Question #4: If the answer to [Question #]3 is negative, state whether any agency of the U.S. Government has a copy of such investigative report. Name the agency.

Government's First Response: 5-8-78; Signed by Cipollone (P10)

No answer required.

Government's Second Response: 2-21-80; Signed by George Parker (P26)

Not Applicable.

Question #5: Has the U.S. Attorney General's office or any agency of the United States used this investigation report in any matter in order to conduct an investigation by the U.S. Attorney General's office or any agency of the U.S. Government regarding the acts allegedly committed by the defendant at Treblinka?

Government's First Response: 5-8-78; Signed by Cipollone (P10)

No answer required.

Question #6: If the answer to [Question #]5 is affirmative, name the agency that used such report.

Government's First Response: 5-8-78; Signed by Cipollone (P10)

No answer required

Question #7: Give the name and address of all the people interviewed in the compilation of such foreign investigative report concerning the allegedly acts of the defendant at Treblinka.

Government's First Response: 5-8-78; Signed by Cipollone (P10)

No answer required.

Government's Second Response: 2-21-80; Signed by George Parker (P26)

Objection. This is protected by work product privilege.

Question #8: Has an agency of the United States Government conducted an investigation and filed a report regarding the acts allegedly committed by the defendant at Treblinka?

Government's First Response: 5-8-78; Signed by Cipollone (P10)

Yes.

Government's Second Response: 11-26-79; Signed by Mendelsohn (P19)

Yes

a. If the answer to [Question #]8 is affirmative, name the agency or agencies.

Government's First Response: 5-8-78; Signed by Cipollone (P10)

U.S. Immigration and Naturalization Services

Government's Second Response: 11-26-79; Signed by Mendelsohn (P19)

U.S. Department of Justice

Question #9: Does the U.S. Attorney for the Northern District of Ohio, Eastern Division, have in his custody or control a copy of such investigative report?

Government's First Response: 5-8-78; Signed by Cipollone (P10)

Yes.

Government's Second Response: 11-26-79; Signed by Mendelsohn (P19)

Yes.

Question #10: Give the names and addresses of all the people interviewed by such U.S. investigator in conjuntion with his investigation of the alleged acts of the defendant at Treblinka.

Government's First Response: 5-8-78; Signed by Cipollone (P10)

The investigative report was not directed solely to this defendant's acts at Treblinka and, therefore, does not contain the names and addresses of all the people interviewed. The investigation concerned itself more with alleged acts committed at Sobibor, Poland.

Government's Second Response: 11-26-79; Signed by Mendelsohn (P19)

Numerous persons were interviewed, but except for Gerald Kravchuk, none claimed any

knowledge of actions of defendant as alleged in counts I-VI of complaint. The Government objects to disclosing names and addresses of persons interviewed for the following reasons: The information is neither relevant nor reasonably calculated to lead to discoverable information; the information is privileged as work of investigators.

Question #11: List the statements, recordings, documents, and papers that the U.S. Attorney for the Northern District of Ohio, Eastern Division, intends to introduce at trial and give a brief description of each.

Government's First Response: 5-8-78; Signed by Cipollone (P10)

Defendant was already given all the statements of foreign witnesses. There are no other formal statements. Documents intended to be introduced are already in the possession of the defendant's attorney. If any new documents come into being, they will be supplied to the defendant's attorney.

Government's Second Response: 11-26-79; Signed by Mendelsohn (P19)

Application for Assistance to International Refugee Organization filed by defendant lists personal information including his employment and residences from birth to 1948 and his desire to emigrate to Argentina.

Personnel cards from Trawniki training school for concentration and extermination camp guards. Lists name, place of birth, and parents as well as other personal data including physical characteristics.

Government's Third Response: 1-80; Signed by Moscowitz (P23)

Attached is a set of witness statements in Hebrew received in January 1980. Presently, they are being translated. Copies of informal translations will be provided when completed.

Question #21: As to the witnesses previously identified in plaintiff's answer in question #1 of the First Set of Interrogatories Directed to Plaintiff,

a. Name the Country from which these witnesses emigrated to Israel.

Government's First Response: 5-8-78; Signed by Cipollone (P10)

Unknown to the Asst. U.S. Attorney.

b. Are these witnesses immigration files or portions thereof in the custody or control of the U.S. attorney for the Northern District of Ohio, Eastern Division, or any agency of the United States?

Government's First Response: 5-8-78; Signed by Cipollone (P10)

No.

c. If not, who is in the custody or control of such files and will the witnesses consent to a reproduction of such files by defendant?

Government's First Response: 5-8-78; Signed by Cipollone (P10)

Unknown

d. Have any of these witnesses filed or prosecuted a suit for monetary damages with the German Governments a result of their confinement at Treblinka or other concentration camps?

Government's First Response: 5-8-78; Signed by Cipollone (P10)

Unknown

e. If so, state name of case, case number, in which Court the case was filed, and which court disposed of same.

Government's First Response: 5-8-78; Signed by Cipollone (P10)

Unknown

f. Are any of these witnesses expected to or have been called as witnesses in other naturalization cases pending in the United States?

Government's First Response: 5-8-78; Signed by Cipollone (P10)

Unknown to the Asst. U.S. Attorney.

Government's Second Response: 11-26-79; Signed by Mendelsohn (P19)

See [Question #6] (First Set) above.

g. If so, state name of case, case number, and name of the District Court and state which witnesses are and/or have appeared as witnesses in each case.

Government's First Response: 5-8-78; Signed by Cipollone (P10)

Unknown to the Asst. U.S. Attorney

Government's Second Response: 11-26-79; Signed by Mendelsohn (P19)

See [Question #6] (First Set) above.

h. How long were each of the witnesses listed in Answer to Question #1, First Set of the Interrogatories, confined at Treblinka? Give exact dates.

Government's First Response: 5-8-78; Signed by Cipollone (P10)

Unknown to the Asst. U.S. Attorney, except as each witness may have indicated in his own statement of which the defendant's attorney had a copy.

Government's Second Response: 11-26-79; Signed by Mendelsohn (P19)

1. Pinchas Epstein, 9-42 to 8-2-69
2. Kurt Franz, 7-42 to 10-43
3. Richard Glazer, 10-42 to 8-2-43
4. Shalom Kohn, 10-1-42 to 8-2-43
5. Sonia Lewkowicz, 12-42 to 8-2-43
6. Georg Rajgrodzki, 9-12-42 to 8-2-43
7. Jakob Szmulowicz, 9-13-42 to 8-42

Question #22: Describe the means and method of identification used by these witnesses in identifying the defendant as a guard at the Treblinka camp.

Government's First Response: 5-8-78; Signed by Cipollone (P10)

Each witness explains his identification in his own statement, of which the defendant's attorney has a copy.

Government's Second Response: 11-26-79; Signed by Mendelsohn (P19)

The witnesses identified Demjanjuk from a photograph shown to them by the Israeli police.

Question #23: If a photograph was used, is such photograph or copy thereof in the custody or control of the U.S. Attorney for the Northern District of Ohio, Eastern Division?

Government's First Response: 5-8-78; Signed by Cipollone (P10)

No.

Government's Second Response: 11-26-79; Signed by Mendelsohn (P19)

Yes.

a. If not in the custody or control of the U.S. Attorney for the Northern District of Ohio, Eastern Division, who has the custody and control of such photograph or copy thereof?

Government's First Response: 5-8-78; Signed by Cipollone (P10)

Unknown to the Asst. U.S. Attorney at this time.

[PETITIONER'S] THIRD SET OF INTERROGATORIES DIRECTED TO PLAINTIFF AND ANSWERS THERETO

Question #12: Of the witnesses identified by plaintiff in answer to Question #1 of the First Set of Interrogatories directed to plaintiff by defendant, state which witnesses have viewed the photograph on Card #1.

Government's First Response: 1-28-80 (govt. date—2-29-80) Signed by Parker (P27)

1. Elijahu Rosenburg
2. Pinchas Epstein
3. Sonia Lewkowicz
4. Samuel Goldberg
5. Otto Horn
6. Moses Rappaport
7. Edward Goldstein

Government's Second Response: 3-80; George Parker (P28)

1. Mayer Zigelman
2. Harry Brenner

Question #15: State the names and addresses of any other persons who were confined at Treblinka during the years 1942-1943, other than those mentioned in interrogatory #12, that viewed the photograph on Card #1.

Government's First Response: 1-28-80 (govt. date—2-29-80) Signed by Parker (P27)

Objection, this information is subject to the Government's investigative privilege, and irrelevant to subject matter.

Question #16: State the names and addresses of any other persons who have knowledge of the allegations set forth in Count V of the Complaint, other than those mentioned in interrogatory #12, that viewed the photograph on Card #1.

Government's First Response: 1-28-80 (govt. date—2-29-80) Signed by Parker (P27)

None.

Question #17: Of those persons identified in interrogatories #12, #15, and #16 state which ones identified the photograph on Card #1 as being "Ivan the Terrible."

Government's First Response: 1-28-80 (govt. Date—2-29-80) Signed by Parker (P27)

1. Elijahu Rosenburg
2. Pinchas Epstein
3. Sonia Lewkowicz

Question #18; Of those persons identified in interrogatories #12, #15, and #16 which ones identified the photograph on Card #1 as being the same individual depicted in photograph #16 of the photospread previously given to the defendant.

Government's First Response: 1-28-80 (govt. date—2-29-80) Signed by Parker (P27)

1. Elijahu Rosenburg
2. Pinchas Epstein
3. Sonia Lewkowicz
4. Otto Horn

Question #57: Give the names and addresses of each person that was at Treblinka during 1942-1943 that viewed the photospread.

Government's First Response: 1-28-80 (govt. date—2-29-80) Signed by Parker (P27)

Objection. This information is protected from disclosure by the government's investigative privilege and is work product. However, to the best of our knowledge 17 persons were shown in the photospread.

Question #58: Of the persons identified in interrogatory #57, state which ones identified suspected war criminals identified in interrogatory #56.

In answering this interrogatory state which suspected war criminal each witness identified.

Government's First Response: 1-28-80 (govt. date – 2-29-80) Signed by Parker (P27)

The following persons identified photograph #16: see Government Answers to Defendant's First Set of Interrogatories filed by Cipollone, Question 1; Government's Supplemental Answers to Defendant's Interrogatories, first set, question 1.

The following identified photograph #17:

1. Sonia Lewkowicz
2. Pinchas Epstein
3. Georg Rajgrodzki
4. Eliahu Rosenberg
5. Gustaw Boraks
6. Eugen Turowski
7. Joseph Czarny
8. Schalom Kohn
9. Abraham Lindwasser
10. Shimon Grunspan

Question #59: Of the persons identified in interrogatory #57, state which persons failed to identify photograph #16.

Government's First Response: 1-28-80 (govt. date – 2-29-80) Signed by Parker (P27)

To the best of our knowledge, no one identified #16 described him as anyone other than a Ukrainian who functioned at Treblinka death camp.

Government's Second Response: 4-21-83; Signed by Moscowitz (P31)

1. Moshe Helman
His statement was given to defendant in early 1978.

2. Shlomo Kohn
Haroeh Street 73, Ramat Gan, Israel

Question #60: Give the names and addresses of each person who has knowledge of the allegations set forth in Count V of the complaint that viewed the photospread.

Government's First Response: 1-28-80 (govt. date – 2-29-80) Signed by Parker (P27)

The Government has provided this information in its Answer and Supplemental Answers to Defendant's First Set of Interrogatories, question 1.

Question #61: Of the persons in interrogatory #60, state which persons identified photograph #16 as an individual who committed such acts.

Government's First Response: 1-28-80 (govt. date – 2-29-80) Signed by Parker (P27)

See answer to question #60 above. Furthermore, government has provided to defendant witness statements of such persons.

Question #62: As to the allegations set forth in Count V of the Complaint state:

a. where and when the defendant allegedly committed such acts.

Government's First Response: 1-28-80 (govt. date – 2-29-80) Signed by Parker (P27)

At Treblinka Extermination Camp between fall of 1942 and to spring of 1943.

b. which witness previously identified in answer to Question #1 of the First Set of Interrogatories directed to plaintiff by defendant will testify as to such acts . . . Objection, this information is privileged as trial strategy.

c. correspond each witness in subsection b to the acts which they will testify to.

Government's First Response: 1-28-80 (govt. date – 2-29-80) Signed by Parker (P27)

Objection, this information is privileged trial strategy.

Question #63: Has the plaintiff or its agents interviewed anyone that has stated that either during the interview or previous thereto that "Ivan the Terrible" is dead?

Government's First Response: 1-28-80 (govt. date – 2-29-80) Signed by Parker (P27)

No.

Question #66: Give the name, address, and telephone number of the chief investigator for this case in each of the following countries:

a. United State of America

Government's First Response: 1-28-80 (govt. date – 2-29-80) Signed by Parker (P27)

Objection, irrelevant to subject matter.

b. Israel

Government's First Response: 1-28-80 (govt – 2-29-80) Signed by Parker (P27)

Objection, irrelevant to subject matter.

c. West Germany

Government's First Response: 1-28-80 (govt – 2-29-80) Signed by Parker (P27)

Objection, irrelevant to subject matter.

d. Poland

Government's First Response: 1-28-80 (govt – 2-29-80) Signed by Parker (P27)

Objection, irrelevant to subject matter.

DEFENDANT'S FOURTH SET OF INTERROGATORIES PROPOUNDED TO PLAINTIFF AND GOVERNMENT'S ANSWERS THERETO

Question #1: Name the government witnesses who will testify that the defendant was at Sobibor during World War II.

Gove:nment's First Response: 5-12-80; Signed by Moscowitz (P30)

None, at this time.

Question #2: As to each witness named in interrogatory #1 briefly state their expected testimony.

Government's First Response: 5-12-80; Signed by Moscowitz (P30)

Not applicable.

Question #5: Within 7 days after the expected Soviet witnesses are confirmed to be witnesses or deponents in this matter state:

a. Each person's name and addresses

Government's First Response: 5-12-80; Signed by Moscowitz (P30)

Not applicable

b. Each persons' expected testimony and specifically whether or not each person is an eyewitness to the allegations set forth in Counts II and/or III of plaintiff's complaint.

Government's First Response: 5-12-80; Signed by Moscowitz (P30)

Not applicable.

c. Set forth in detail any identification procedures used in conjunction with such Soviet witnesses including:

1. The specific method of identification;
2. The photos used, if any;
3. The person conducting the identification procedure; and
4. The date of the positive identification of the defendant or a suspected photo of the defendant.

Government's First Response: 5-12-80; Signed by Moscowitz (P30)

Not applicable

d. Is the plaintiff or its agents in possession of any written statements made by any of the above mentioned persons. If so, will plaintiff attach such statements to the answers to these interrogatories?

Government's First Response: 5-12-80; Signed by Moscowitz (P30)

Not applicable.

Question #9: State the name of each persons who viewed either P-1 or P-2 and as a result positively identified a photograph suspected of being that of the defendant.

a. P-1

Government's First Response: 5-12-80; Signed by Moscowitz (P30)

1. Edward Goldstein
2. Moses Rapaport
3. Meyer Zigelman
4. Abram Kolski
5. Harry Feldgraber
6. Sonia Lewkowicz
7. Eliahu Rosenber
8. Pinchas Epstein
9. Otto Horn
10. Czeslaw Augustyniak

Government's Second Response: 9-5-80; Signed by Moscowitz and Horrigan (P35)

1. I.N. Ivchenko
2. I.T. Danil'chenko
3. P.S. Bondaruk
4. P.S. Garbruk
5. I.M. Bazelyuk

b. P-2

Government's First Response: 5-12-80; Signed by Moscowitz (P30)

1. Edward Goldstein
2. Moses Rapaport
3. Abram Kolski
4. Henry Brenner
5. Meyer Zigelman
6. Chiel Reichman
7. Otto Horn
8. Czeslaw Augustyniak

Question #10: As to the persons in the answer to question #9, state the date each person made such identification, where the identification procedure took place, who conducted the identification procedure, and who else, if anyone, was present when the identification took place.

a. P-1

Government's First Response: 5-12-80; Signed by Moscowitz (P30)

> Objection, this information is privileged for the reasons held by the Court in sustaining the Government's objection to Interrogatory 66, in its order of April 8, 1980.

b. P-2

Government's First Response: 5-12-80; Signed by Moscowitz (P30)

> Objection, this information is privileged for the reasons held by the Court in sustaining the Government's objection to Interrogatory 66, in its order of April 8, 1980.

Government's Second Response (a&b): 6-24-80; Signed by Horrigan (P34—see for detail)

1. Edward Goldstein, 1-28-80
2. Moses Rapaport, 1-29-80
3. Meyer Zigelman, 1-30-80
4. Abram Kolski, 2-15-80
5. Harry Feldgraber, 1-29-80
6. Sonia Lewkowicz, 12-25-79
7. Eliahu Rosenberg, 12-25-79
8. Pinchas Epstein, 12-25-79
9. Otto Horn, 11-14-79; 2-80
10. Czeslaw Augustyniak, 2-15-80
12. Henry Brenner, 1-20-80
13. Chiel Reichman, 3-6-80

Government's Third Response (a&b): 9-5-80; Signed by Moscowitz and Horrigan (P35—see for detail)

1. I.N. Ivchenko, 9-18-79
2. I.T.Danil'chenko, 11-22-79
3. P.S. Bandaruk, 7-9-79
4. P.S. Garbruk, 7-9-79
5. I.M. Bazelyuk, 9-25-79

Question #11: State the name and addresses of each person who viewed either P-1 or P-2 and as a result failed to identify a photograph suspected of being that defendant.

a. P-1

Government's First Response: 5-12-80; Signed by Moscowitz (P30)

1. Flossenburg

   a. Tadusz Sowinski
   Manhattan Ave., Brooklyn, NY

   b. Jack Eisner
   Gabay Lane, New Rochelle, NY

   c. Adek Ralnik
   75-11 168th St., Flushing, NY

   d. Alfred Kohn
   Bloomingrove Turnpike, New Mindsor, NY

2. Sobibor

   Chaskiel Menche
   Melbourne, Australia

3. Treblinka

   a. Morton Mattel
   4202 Hillcrest Dr., Hollywood, FL

b. William Schneiderman
9501 Sunrise Lake Blvd., Fort Lauderdale, FL

c. Henry Brenner

d. Sam Goldberg
7125 Bonita Dr., Miani Beach, FL

e. Chiel Reichman

f. David Lieberman
1488 Schenectedy Ave., Brooklyn, NY

g. Morris Mydlo
7627 Glemwood Rd., Brooklyn, NY

h. Joe Tekulsky
6412 Dewew Ave., West New York, NY

i. Chaim Sztayer
Glen Ervin Rd., Melbourne, Australia

j. Henryk Poswolski
Sao Conrado, Rio de Janiera, Brazil

k. Henryk Sperling
Boora Dr., Glascow, Scotland

l. Aaron Czechowicz
San Bernadino, Cracas, Venezuela

Government's Second Response: 9-5-80; Signed by Moscowitz and Horrigan

N.P. Malagon
Novo-Petrovka, Berdiansk Raion, Zaporozhe Oblast'

b. P-2

Government's First Response: 5-12-80; Signed by Moscowitz (P30)

1. Treblinka
    a. Kurt Franz
    b. Franz Suchomel
    c. Mortin Mattel
    d. William Schneiderman
    e. Sam Goldberg
    f. David Lieberman
    g. Morris Mydlo
    h. Joe Tekulsky
    i. Chaim Sztayor
    j. Henryk Poswalski
    k. Henryk Sperling
    l. Aaron Czecgowicz
2. Sobibor
    a. Philip Bialovitz
    Cambria Ave., Little Neck, NY
    b. Thomas Blatt
    Woodley Ct., Santa Barbara, CA
    c. Herszel Cukierman
    Chancellor Ave., Irvington, NY
    d. Samul Lerer
    E. 81 St., Brooklyn, NY
    e. Chaskiel Menche
3. Flossenberg
    a. Tadeucz Sowinski
    b. Jack Eisner
    c. Adek Rolnick
    d. Alfred Krohn

Question #12: As to the persons named in the answer to question #11, state the date each person failed to make such identification, where the identification procedure took place, and who conducted the identification procedure.

a. P-1:

Government's First Response: 5-12-80; Signed by Moscowitz (P30)

Not applicable. Objection, for the reasons stated in answer to interrogatory 10 and on the ground that the information is not relevant to the subject matter of this proceeding.

b. P-2

Government's First Response: 5-12-80; Signed by Moscowitz (P30)

Not applicable. Objection, for the reasons stated in answer to interrogatory 10 and on the ground that the information is not relevant to the subject matter of this proceeding.

Question #13: State the name of each prospective witness who identified photograph #16 of the 43 person photospread as being of the same person depicted on the Treblinka Training Card Photo.

Government's First Response: 5-12-80; Signed by Moscowitz (P30)

Objection. This interrogatory is repetitive, having already been asked and answered.

Question #14: State the names and addresses of each person who viewed the 43 person photospread and as a result positively identified a photograph of being the defendant.

Government's First Response: 5-12-80; Signed by Moscowitz (P30)

Objection. This interrogatory is repetitive, having already been asked and answered.

Question #15: As to the persons named in the answer to question #14, state the date each person made such identification, where the identification took place, who conducted the identification procedure, and who else, if anyone, was present when the identification took place.

Government's First Response: 5-12-80; Signed by Moscowitz (P30)

Objection, on the same ground as stated in the answer to interrogatory 10.

Government's Second Response: 6-24-80; Signed by Horrigan (P34)

The information sought in this interrogatory has been previously supplied to counsel for defendant. Such information is contained in the statements of the various witnesses produced by Assistant United States Attorney's Cipollone and Horrigan pursuant to Defendant's Motion for Production of Documents.

Question #16: State the names and addresses of each person who was confined at Treblinka during the year 1942 through 1943 and who viewed the 43 person photospread and failed to identify photograph #16 of such photospread.

Government's First Response: 5-12-80; Signed by Moscowitz (P30)

Objection. This interrogatory is repetitive, having already been asked and answered.

Question #17: As to the persons named in the answer to question #16, state the date each person failed to make such identification, where the identification

procedure took place and who conducted the identification procedure.

Government's First Response: 5-12-80; Signed by Moscowitz (P30)

Objection. This interrogatory is repetitive, having already been asked and answered.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-3435

JOHN DEMJANJUK, PETITIONER-APPELLANT

v.

JOSEPH PETROVSKY, ET AL., RESPONDENTS-APPELLEES

[FILED JUNE 05, 1992]

Before: MERRITT, Chief Judge.

ORDER

For good cause shown, this matter is restored to the Court's docket and assigned pursuant to Rule 3, Rules of the Sixth Circuit, to a panel consisting of Merritt, Chief Judge; Keith, Circuit Judge; and Lively, Senior Circuit Judge, for further proceedings.

This 3rd day of June, 1992.

/s/ Gilbert S. Merritt

GILBERT S. MERRITT, Chief Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-3435

JOHN DEMJANJUK, PETITIONER-APPELLANT

v.

JOSEPH PETROVSKY, ET AL., RESPONDENTS-APPELLEES

[FILED FEBRUARY 24, 1994]

Before: MERRITT, Chief Judge; KEITH, Circuit Judge; and LIVELY, Senior Circuit Judge.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were

fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT.

/s/ Leonard Green

LEONARD GREEN, Clerk

Supreme Court, U.S.
FILED
JUN 23 1994
CLERK

No. 93-1875

In The

Supreme Court of the United States

October Term 1993

R.H. RISON, ET AL.,

Petitioners,

v.

JOHN DEMJANJUK,

Respondent.

BRIEF OF JERROLD NADLER, HOLOCAUST SURVIVORS IN PURSUIT OF JUSTICE, INC. AND WORLD JEWISH CONGRESS AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

ELIZABETH HOLTZMAN
Counsel of Record
Herrick, Feinstein
2 Park Avenue
New York, NY 10016
(212) 684-1400

SANFORD HAUSLER
1568 59th Street
Brooklyn, NY 11219
(718) 633-0847

Attorneys for Amici Curiae

June 22, 1994

PRINTINGHOUSE PRESS 25 WEST 43RD STREET NEW YORK, NY 10036 (212) 719-3120

QUESTIONS PRESENTED

1. Does the "stigma" of an extradition order, without any other collateral legal consequences, justify an exception to the mootness doctrine, allowing the Sixth Circuit to vacate the extradition order, when the extradition has already been effected and the foreign prosecution resulted in a reversal of the accused's conviction?

2. If *Brady v. Maryland* is applied to extraditions, does it require the production of exculpatory evidence that is inadmissible and unlikely to lead to admissible evidence because of the narrow scope of extradition hearings or should the nature of extradition hearings be radically restructured to allow such evidence to be admitted?

3. Given the federal courts' special duty to reject ethnic stereotypes in the judicial process, should a Court of Appeals' decision, which suggests that political pressure applied by Jews and Jewish groups led to the Government's withholding of exculpatory evidence, be allowed to stand when the Court's Special Master's conclusion that the opposite was true was not found to be clearly erroneous?

TABLE OF CONTENTS

Pages

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI* 1

PROCEDURAL BACKGROUND 3

REASONS FOR GRANTING THE WRIT 8

I. THE SIXTH CIRCUIT HAS ADDED A "STIGMA" EXCEPTION TO THE CONSTITUTIONAL DOCTRINE OF MOOTNESS 8

II. IN APPLYING *BRADY V. MARYLAND* TO AN EXTRADITION CASE FOR THE FIRST TIME, THE SIXTH CIRCUIT BROADENED *BRADY* TO REQUIRE THE PRODUCTION OF EVIDENCE IRRELEVANT TO PROBABLE CAUSE 12

III. THE SIXTH CIRCUIT'S CHARACTERIZATION OF CONTACTS BETWEEN THE JUSTICE DEPARTMENT AND JEWISH GROUPS AND INDIVIDUALS WARRANTS REVIEW BY THIS COURT 17

CONCLUSION 20

TABLE OF AUTHORITIES

Cases *Pages*

Ahmad v. Wigen, 726 F.Supp 389 (E.D.N.Y. 1989), *aff'd*, 910 F.2d 1063 (2d Cir. 1990) 9

Bankers Mortgage Co. v. United States, 423 F.2d 73 (5th Cir.), *cert. denied*, 399 U.S. 927 (1970) 6

Batson v. Kentucky, 476 U.S. 79 (1986) 19

Brady v. Maryland, 373 U.S. 83 (1963) i, 2, 6, 7, 8, 12, 14, 15, 16

Caplan v. Vokes, 649 F.2d 1336 (9th Cir. 1981) 15

Carafas v. LaVallee, 391 U.S. 234 (1968) 10

Charlton v. Kelly, 229 U.S. 447 (1913) 9, 12

Collins v. Loisel, 259 U.S. 309 (1922) 12, 13

Demjanjuk v. Israel, Crim. App. No. 347/88 (Sup. Ct. July 29, 1993) 3, 4

Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993) 4, 5, 7, 8, 9, 13, 17, 18

Demjanjuk v. Petrovsky, 612 F. Supp. 571 (N.D. Ohio 1985), *aff'd*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986) 3, 7, 8, 9, 13, 14

Demjanjuk v. Petrovsky, Docket No. 85-3435, slip opn. (6th Cir. Aug. 3, 1993) 5, 7

Fernandez v. Phillips, 268 U.S. 311 (1925) 14

First National City Bank of New York v. Aristeguiesta, 287 F.2d 219 (2d Cir. 1960), *vacated for mootness*, 375 U.S. 49 (1963) 14

Fiswick v. United States, 329 U.S. 211 (1946) 9. 10

Freedman v. United States, 437 F. Supp. 1252 (N.D. Ga. 1977) 13

Georgia v. McCollum, 112 S. Ct. 2348 (1992) 19

In re Demjanjuk, 603 F. Supp. 1463 (N.D. Ohio 1984) . . 12, 14

In re Extradition of Demjanjuk, 612 F. Supp. 544 (N.D. Ohio 1985) 3

In re Koskotas, 127 F.R.D. 13 (D. Mass. 1989) 14, 15

In re Luis Oteiza y Cortes, 136 U.S. 330 (1890) 14

In re Sindona, 450 F. Supp. 672 (S.D.N.Y. 1978), *aff'd sub nom. Sindona v. Grant*, 619 F.2d 167 (2d Cir. 1980) 12

In re Singh, 123 F.R.D. 108 (D.N.J. 1987) 15

Indian Head National Bank of Nashua v. Bruelle, 689 F.2d 245 (1st Cir. 1982) 6

Israel v. Demjanjuk, Crim. Case (Jerusalem) No. 373/86 (April 18,1988), *rev'd*, Crim. App. No. 347/88 (Sup. Ct. July 29,1993) 3, 4

Kearns v. Turner, 837 F.2d 336 (8th Cir. 1988) 11

Lewis v. Continental Bank Corp., 110 S. Ct. 1249 (1990) . . . 9

Merino v. United States Marshal, 326 F.2d 5 (9th Cir. 1963) 16

North Carolina v. Rice, 404 U.S. 244 (1971) 9

Oil Workers Unions v. Missouri, 361 U.S. 363 (1960) 9

Peryea v. United States, 782 F. Supp. 937 (D. Vt. 1991), *aff'd w/o opn.*, 970 F.2d 896 (2d Cir. 1992) 15

Porcelli v. Joseph Schlitz Brewing Co., 78 F.R.D. 499 (E.D. Wis.), *aff'd w/o opn.*, 588 F.2d 838 (7th Cir. 1978) 6

Shapiro v. Ferrandina, 355 F. Supp. 563 (S.D.N.Y.), *modified*, 478 F.2d 894 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973) 13

Shapiro v. Ferrandina, 478 F.2d 894 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973) 12

Sibron v. New York, 392 U.S. 50 (1968) 10

St. Pierre v. United States, 319 U.S. 41 (1943) 10

Taft v. Donellan Jerome, Inc., 407 F.2d 807 (7th Cir. 1969) . . 6

Teltronics Services, Inc. v. Anaconda-Ericsson, Inc., 587 F. Supp. 724 (E.D.N.Y. 1984), *aff'd sub nom. Anaconda-Ericsson, Inc. v. Hessen* (*In re Teltronics Services, Inc.*), 762 F.2d 185 (2d Cir. 1985) 6

United States ex rel Aigner v. Shaughnessy, 175 F.2d 211 (2d Cir. 1949) 6

United States ex rel. Karadzole v. Artukovic, 170 F. Supp. 383(S.D. Cal. 1959) 14

United States v. Bagley, 473 U.S. 667 (1985) 15

United States v. Case, 684 F. Supp. 109 (D.N.J. 1988), *aff'd w/o opn*, 866 F.2d 1413 (3d Cir. 1988) 11

United States v. Demjanjuk, 518 F. Supp. 1362 (N.D. Ohio 1981), *aff'd*, 680 F.2d 32 (6th Cir.), *cert. denied*, 459 U.S. 1036 (1982) 3, 9

United States v. Keane, 852 F.2d 199 (7th Cir. 1988) 10

United States v. Loftus, 796 F. Supp. 815 (M.D. Pa. 1992) . . 10

United States v. Philip, 948 F.2d 241 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1994 (1992) 15

United States v. Taitz, 134 F.R.D. 288 (S.D. Cal. 1991) 14

Weisman v. Charles E. Smith Management, Inc., 829 F.2d 511 (4th Cir. 1987) 6

Statute and Rules

Federal Rule of Civil Procedure 53(e)(2) 17

Federal Rule of Civil Procedure 60(b) 6, 7

8 U.S.C. § 1182(a)(3)(E)(i) 5

18 U.S.C. § 3190 14

Miscellaneous

M. Bassiouni, *International Extradition: United States Law and Practice* (2d rev. ed. 1987) 12

In The

Supreme Court of the United States

October Term 1993
No. 93-1875

R.H. RISON, ET AL.,

Petitioners,

v.

JOHN DEMJANJUK,

Respondent.

BRIEF OF JERROLD NADLER, HOLOCAUST SURVIVORS IN PURSUIT OF JUSTICE, INC. AND WORLD JEWISH CONGRESS AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Upon consent of all parties to this action, *amici curiae* submit this brief in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit (the "Petition") of petitioners (the "Government").

INTEREST OF AMICI

Amicus Jerrold Nadler is a member of the House of Representatives, representing the Eighth Congressional District of New York. Nadler sits on the Subcommittee on International Law, Immigration and Refugees of the House Judiciary Committee and, in this capacity, has a special interest in seeing that the immigration and extradition laws are not circumvented by improper judicial action.

Amici Holocaust Survivors and Friends in Pursuit of Justice, Inc. and the World Jewish Congress (the "Organizational *Amici*") are Jewish organizations whose purpose is, in large part, to combat anti-Semitism. They are concerned with bringing to justice those who persecuted Jews during the Nazi era and believe it is fully within their rights to communicate with the Justice Department and other parts of the Legislative or Executive branches of government to urge government action that is consistent with the purposes for which they exist. They believe that the Sixth Circuit's decision incorporates stereotypes of Jews which have no place in a judicial decision and create potential adverse consequences for the exercise of their right to communicate with the government. For this reason, the Organizational *Amici*, along with Nadler, raise the issue in this brief.

Amici concur with the position taken in the Petition. In addition, *amici* believe this Court should address the issue of the Sixth Circuit's jurisdiction and the implications for extradition procedure of the Sixth Circuit's improper application of the *Brady* doctrine. As these issues were not fully briefed by the Government, *amici* believe that this brief will be of use to the Court.

PROCEDURAL BACKGROUND

This case involves the extradition of Ivan (John) Demjanjuk ("Demjanjuk"), who was sent to Israel[1] on charges that he had committed multiple acts of murder while serving as a guard at the Treblinka death camp.[2] The district court found probable cause to believe that Demjanjuk had committed these crimes based on eyewitness affidavits of three Treblinka survivors, who identified Demjanjuk as a Treblinka guard they knew as Ivan, and ordered his extradition. *In re Extradition of Demjanjuk*, 612 F. Supp. 544, 552, 566 (N.D. Ohio 1985).

Demjanjuk unsuccessfully challenged the extradition order in a habeas corpus proceeding. *Demjanjuk v. Petrovsky*, 612 F. Supp.

---

1 Citations to the Israeli District Court decision, *Israel v. Demjanjuk*, Crim. Case (Jerusalem) No. 373/86 (Apr. 15, 1988), *rev'd*, Crim. App. No. 347/88 (Sup. Ct. July 29, 1993), will be to the published translation found in *The Demjanjuk Trial* (A. Landau ed. 1991). Citations to the Israeli Supreme Court decision, *Demjanjuk v. Israel*, Crim. App. No. 347/88 (Sup. Ct. July 29, 1993), will be designated Isr. Sup. Ct. ¶ __. Citations to the Special Master's Report will be designated S.M. Rep. __.

2 Demjanjuk had previously been denaturalized and ordered deported based on his misrepresentation and concealment of his wartime service and activities at the Treblinka death camp and the SS camp at Trawniki. *United States v. Demjanjuk*, 518 F. Supp. 1362 (N.D. Ohio 1981), *aff'd*, 680 F.2d 32 (6th Cir.), *cert. denied*, 459 U.S. 1036 (1982). The Government also presented documentary evidence at the denaturalization hearing that Demjanjuk had been an SS guard at the Sobibor death camp; however, the denaturalization court declined to rule on that ground because it found that service at either Treblinka or Trawniki was sufficient grounds for denaturalization. *Id.* at 1376 n.31. At Demjanjuk's criminal trial in Israel, further evidence of his service at Sobibor and perpetration of attrocities there was introduced by Demjanjukhimself. *The Demjanjuk Trial* 325; Isr. Sup. Ct. ¶ 176. While his appeal to the Israeli Supreme Court was pending, captured Nazi documents from recently opened Soviet archives were adduced, showing that Demjanjuk had also been a guard at the Regensburg and Flossenburg concentration camps and the Lublin SS camp. Isr. Sup. Ct. ¶458, 459.

571 (N.D. Ohio 1985), *aff'd*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986) .

After a trial on the merits before the Israeli District Court, Demjanjuk was convicted of being Ivan the Terrible of Treblinka, a particularly sadistic guard and gas chamber operator, and of having taken part in the mass murder of Jews at the Sobibor death camp. *The Demjanjuk Trial* 373. On appeal, the Supreme Court of Israel, while finding the eyewitness testimony convincing, Isr. Sup. Ct. ¶ 452, was troubled by purported statements of certain deceased Treblinka guards, discovered in Soviet archives after the trial had been completed, which suggested that someone other than Demjanjuk might have been Ivan the Terrible. Although the Israeli Supreme Court recognized that the Treblinka guards' statements might not be authentic or accurate, *id.* ¶ 454, it nonetheless reversed the conviction on the ground that the statements raised sufficient doubt to foreclose Demjanjuk's conviction. The Court further stated that these statements in no way affected the factual record proving that Demjanjuk had served as a guard at the SS Trawniki camp and the Sobibor death camp and was thus "part of the extermination machine," *id.* ¶ 459, nor detracted from the documentary evidence indicating that he served at other Nazi concentration camps. *Id.* ¶ 458.

While the Israeli Supreme Court's decision was pending, the Sixth Circuit panel in the habeas corpus proceeding reopened the proceeding, *sua sponte*, to ascertain whether a fraud had been committed on the court in the procurement of the extradition order. *Demjanjuk v. Petrovsky*, 10 F.3d 338, 357 (6th Cir., 1993). It appointed a Special Master to take evidence and report on the matter. *Id.* at 357-58.

The Special Master found that the Government had committed no fraud on the court. Although he found that certain documents should have been turned over to Demjanjuk, the Government's actions were found to be in good faith and not reckless. S.M. Rep. 193. He also stated that the denaturalization and deportation decisions remained valid (as they were based not only on Demjanjuk's alleged Treblinka service, but also on the independent

ground of his Trawniki service), S.M. Rep. 210, and he recommended that the habeas corpus proceeding be closed.

Before the Sixth Circuit had acted on the Special Master's findings, the Israeli Supreme Court reversed Demjanjuk's conviction. The Sixth Circuit then issued a writ of habeas corpus, prohibiting the Government from interfering with Demjanjuk's return to the United States, although his return appeared to violate a valid deportation order and the Holtzman Amendment.[3] *Demjanjuk v. Petrovsky*, Docket No. 85-3435, slip opn. (6th Cir. Aug. 3, 1993).

The Sixth Circuit rejected the ultimate finding of the Special Master, holding that, regardless of its good faith, the Government had recklessly violated its obligations under *Brady* and had thus committed a fraud on the court in procuring the extradition order. 10 F.3d at 354. The court vacated that order.

Beginning with its *sua sponte* reopening of the habeas corpus proceeding, the court acted on the basis of novel legal theories, contradicted by precedents of this Court and the other circuits, or utilized unusual legal procedures. It also made a number of inaccurate or misleading factual findings.

The novel legal theories adopted by the Court include:

1. It implicitly ruled that stigma alone prevents mootness and is a sufficient predicate for a justiciable case or controversy. *See* Point I, *infra*.

---

[3] 8 U.S.C. § 1182(a)(3)(E)(i) (bars persons who "participated" in persecution under the Nazis from entering the United States). The denaturalization court's finding that Demjanjuk was a guard at Trawniki and the Israeli Supreme Court's reaffirmation of that finding and its reference to Demjanjuk's service at other Nazi death camps, including Sobibor, provide sufficient basis to exclude Demjanjuk under the statute's prohibition.

2. It decided that the rule of *Brady v. Maryland* applies in extradition and denaturalization cases where underlying criminal acts are at issue. It is the only court to so hold. *See* Point II, *infra*.

3. It implicitly ruled that *Brady* either required (1) the production of evidence which is not relevant to the probable cause showing in an extradition proceeding and therefore evidence which is not admissible in such proceedings or (2) the wholesale restructuring of extradition proceedings to make such evidence admissible. *See* Point II, *infra*.

4. It ruled that a violation of *Brady*, even one committed in good faith, constituted a fraud on the court under Rule 60(b).[4]

5. It implicitly ruled that hearsay documentary evidence submitted by the accused is admissible in an extradition proceeding. *See* Point II, *infra*.

6. It implicitly ruled that a Rule 60(b) motion may be made in a different court and a different proceeding from that in which the alleged fraud was perpetrated.[5]

The novel procedures used by the court included:

---

[4] This issue is discussed in the Petition.

[5] Every court that has considered the question has concluded that a Rule 60(b) motion, under the Federal Rules of Civil Procedure, with a few exceptions not relevant here, "must be filed in the district court and in the action in which the original judgment was entered." *Bankers Mortgage Co. v. United States*, 423 F.2d 73, 78 (5th Cir.)(footnote omitted), *cert. denied*, 399 U.S. 927 (1970). *See also Weisman v. Charles E. Smith Management, Inc.*, 829 F.2d 511, 513 (4th Cir. 1987); *Indian Head National Bank of Nashua v. Bruelle*, 689 F.2d 245, 249 (1st Cir. 1982); *Taft v. Donellan Jerome, Inc.*, 407 F.2d 807, 809 (7th Cir. 1969); *United States ex rel Aigner v. Shaughnessy*, 175 F.2d 211, 212 (2d Cir. 1949); *Teltronics Services, Inc. v. Anaconda-Ericsson, Inc.*, 587 F. Supp. 724, 729 (E.D.N.Y. 1984), *aff'd sub nom. Anaconda-Ericsson Inc. v. Hessen (In re Teltronics Services, Inc.)*, 762 F.2d 185 (2d Cir. 1985); *Porcelli v. Joseph Schlitz Brewing Co.*, 78 F.R.D. 499, 500 (E.D. Wis.), *aff'd w/o opn.*, 588 F.2d 838 (7th Cir. 1978).

1. Citing press reports, it reopened the habeas corpus proceeding *sua sponte* to consider whether, under Rule 60(b), a fraud on the court had been committed by the Government in the extradition proceeding. 10 F.3d at 357.

2. It bypassed the extradition judge and appointed another judge as Special Master to report on the issue of fraud, claiming that remand would be a "cumbersome and dilatory procedure." 10 F.3d at 358. However, it previously ruled that the denaturalization judge should handle the extradition proceeding because "[j]udicial economy is served by requiring a judge familiar with the case to consider collateralattacks on the judgment." 776 F.2d at 571.[6]

3. Before deciding the case, it issued a writ of habeas corpus, *Demjanjuk v. Petrovsky*, Docket No. 85-3435, slip opn. (6th Cir. Aug. 3, 1993), prohibiting the Government from interfering with Demjanjuk's return to the United States despite the fact that a valid deportation order was in effect against him and his entry was prohibited by the Holtzman Amendment.

In addition, the Sixth Circuit made a number of factual findings that were inaccurate or misleading:

1. It found that the Government should have produced the Polish Main Commission Article to Demjanjuk prior to the denaturalization hearing. 10 F.3d at 351. However, the article was produced to Demjanjuk in 1982, three years before the extradition hearing, Petition at 13 n.10, 20 n.16, and, in any event, could not form the basis of a *Brady* violation in the extradition. *See* Point II, *infra*.

2. It found that the Government's failure to produce the Otto Horn Memoranda, which might have been used to undermine the credibility of Horn, an SS nurse at Treblinka, as a witness,

---

6 The district judge had presided at Demjanjuk's denaturalization, extradition and habeas corpus proceedings. The Special Master had no previous experience with this case.

constituted a *Brady* violation. 10 F.3d at 351. Horn's identification of Demjanjuk, however, was not introduced at his extradition proceeding, and thus the memoranda could not form the basis of a *Brady* violation in the extradition. Petition at 20 n.16. *See also Demjanjuk*, 612 F. Supp. at 566 (probable cause showing rested on survivor affidavits).

3. It cited a lecture tour in Israel by Allan Ryan, Jr., the former director of the United States Justice Department's Office of Special Investigations ("OSI") on behalf of the Anti-Defamation League of B'nai B'rith ("ADL") as an example of Jewish influence on OSI. The lecture tour, however, took place three years *after* Ryan had left OSI. *See* Point III, *infra*.

4. It mischaracterized the substance of Treblinka guard Malagon's statement, asserting that Malagon identified Demjanjuk's picture as that of a cook at Treblinka, not as Ivan the Terrible. 10 F.3d at 350. Malagon, however, stated: "Here, from what other guards (whose names I do not remember) said, I learned that Ivan Demedyuk o[r] Ivan Dem'yanyuk, who had worked as a cook at Treblinka, *had been transferred to work as a gas chamber driver*." *Id.* at 366 (emphasis added).

In taking these actions, based in part on these factual errors, the Sixth Circuit has acted contrary to numerous decisions of this Court and other circuits. As shown below, the issues involved in this case warrant this Court's review. Therefore, this Court should grant the Petition and reverse the decision of the Sixth Circuit.

REASONS FOR GRANTING THE WRIT

I.
THE SIXTH CIRCUIT HAS ADDED A "STIGMA" EXCEPTION TO THE CONSTITUTIONAL DOCTRINE OF MOOTNESS

In finding that there was a live case or controversy in this case, the Sixth Circuit has engrafted a new exception onto the

constitutional doctrine of mootness. Such an exception is in conflict with the decisions of this Court and other circuits and, thus, warrants review.

As this Court has repeatedly stated, "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (per curiam). *See also Lewis v. Continental Bank Corp.*, 110 S. Ct. 1249, 1253 (1990); *Oil Workers Unions v. Missouri*, 361 U.S. 363, 367 (1960). "This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial or appellate." *Lewis*, 110 S. Ct. at 1253.

The Sixth Circuit, recognizing the presence of a mootness issue, and relying on this Court's decision in *Fiswick v. United States*, 329 U.S. 211 (1946), asserted that the stigma of "being found by a court and convicted for being one of the most notorious perpetrators of Holocaust atrocities,"[7] 10 F.3d at 355, prevents this case from being

---

[7] The extradition court did *not* find that Demjanjuk was Ivan the Terrible. It merely found that "there was sufficient evidence to find probable cause" that Demjanjuk was Ivan the Terrible. 612 F. Supp. at 566. There is some suggestion that the court was referring to the finding of the denaturalization court. *See* 10 F.3d at 356 ("The extradition order was based largely on the district court's finding in the denaturalization case that Demjanjuk was Ivan the Terrible."). *Amici* assume that such is not the case because (1) the court had no jurisdiction over the denaturalization case (which had been affirmed by a different panel of the Sixth Circuit, *United States v. Demjanjuk*, 680 F.2d 32 (6th Cir.), *cert. denied*, 459 U.S. 1036 (1982) (panel consisted of Circuit Court Judges Kennedy and Martin and Senior Circuit Judge Phillips)), (2) the court specifically stated that it was attempting "to mitigate the collateral consequences of the extradition order *only*," 10 F.3d at 356 (emphasis added), (3) the probable cause finding was not based on the evidence presented at the denaturalization hearing, but rather was based on survivor affidavits which reaffirmed for the extradition court the survivors' identification of Demjanjuk, 612 F.Supp. at 566, and (4) the denaturalization was not a requirement for extradition; the United States can and has extradited its own citizens. *See Charlton v. Kelly*, 229 U.S. 447, 467 (1913); *Ahmad v. Wigen*, 726 F.Supp. 789 (E.D.N.Y. 1989) (extraditing a U.S. citizen to Israel), *aff'd*, 910 F.2d 1063 (2d Cir. 1990).

moot.[8]

But this Court has explicitly rejected the "stigma" exception in *St. Pierre v. United States*, 319 U.S. 41 (1943) (per curiam). That case involved an individual jailed for criminal contempt and sentenced to five months imprisonment. Before his case reached the Supreme Court, he was released. While St. Pierre argued that his conviction would stigmatize him, the Court dismissed the writ of certiorari, holding:

> [T]he moral stigma of a judgment which no longer affects legal rights does not present a case or controversy for appellate review.

Id. at 43.

While subsequent decisions of this Court have allowed post-incarceration challenges to criminal convictions because such convictions entail various potential collateral legal consequences for the defendant, *see, e.g., Sibron v. New York*, 392 U.S. 50, 53-57 (1968); *Carafas v. LaVallee*, 391 U.S. 234, 237 (1968), the central principle of *St. Pierre* — that stigma alone does not render a case adjudicable — remains untouched.

In some recent cases involving post-incarceration challenges to criminal convictions by way of a writ of error coram nobis, courts have held that stigma is not a sufficient collateral legal consequence. *See, e.g., United States v. Keane*, 852 F.2d 199, 203 (7th Cir. 1988) ("Criminal convictions sometimes produce financial penalties and diminish the reputation of the defendant, but these do not entail continuing legal effects of a judgment."); *United States v. Loftus*, 796 F. Supp. 815, 827 (M.D. Pa. 1992) ("[T]he stigma of a felony

---

[8] *Fiswick* stands for no such proposition. In that case, the appeal of Fiswick's conviction was not found to be moot despite the fact that Fiswick had already served his sentence because the conviction could subject him to deportation, prevent him from becoming a citizen and expose him to other restrictions of his civil rights. 329 U.S. at 221-22.

conviction is an insufficient collateral consequence."); *United States v. Case*, 684 F. Supp. 109, 113 (D.N.J.) ("[M]ere moral stigma of a conviction will not suffice [for coram nobis relief]."), *aff'd w/o opn.*, 866 F.2d 1413 (3d Cir. 1988).

In this extradition case, where Demjanjuk had already been extradited and his criminal conviction in Israel reversed, there are no collateral legal consequences to Demjanjuk. Indeed, the Sixth Circuit did not identify any.[9]

If the stigma exception is allowed to stand, substantial litigation can be expected to ensue. Criminal defendants who have been acquitted will challenge their indictments, extraditees will seek relief from their already-effected extraditions, civil litigants will continue to fight old battles that have ceased to have any real meaning, all on the basis of "stigma" alone. For this reason, certiorari should be granted, and the Sixth Circuit's decision should be reversed.

---

9 A close parallel can be found in *Kearns v. Turner*, 837 F.2d 336 (8th Cir. 1988). There, Kearns, a federal prisoner, filed a petition for a writ of habeas corpus, seeking to prevent his transfer from a federal prison to state custody for sentencing on a state charge. The transfer, he alleged, would violate the Interstate Agreement on Detainers Act. The district court dismissed the petition for failure to exhaust state remedies. Kearns was then transferred to state custody and sentenced to three years. On appeal, the Eighth Circuit affirmed the dismissal of the petition, stating:

> Insofar as Kearns sought to enjoin the transfer,... there is no longer a live controversy. Kearns has been transferred and sentenced; the matter is moot.

Id. at 338. It should be noted that despite the fact that there were serious collateral legal consequences to Kearns's transfer — he was sentenced to three years imprisonment — the case was found to be moot.

II.

IN APPLYING *BRADY V. MARYLAND* TO AN EXTRADITION CASE FOR THE FIRST TIME, THE SIXTH CIRCUIT BROADENED *BRADY* TO REQUIRE THE PRODUCTION OF EVIDENCE IRRELEVANT TO PROBABLE CAUSE

In applying *Brady v. Maryland*, 373 U.S. 83 (1963), for the first time to an extradition proceeding, the Sixth Circuit seems to have confused the narrow probable cause hearing that characterizes an extradition proceeding with a trial on the merits. The purportedly exculpatory evidence referred to by the Sixth Circuit would have been irrelevant to the probable cause showing and would have been inadmissible under normal extradition rules.

In order to prevent extradition proceedings from becoming mini-trials, this Court has long held that only evidence relating to the probable cause showing is admissible on the accused's case. Courts have defined such admissible evidence as "explaining" the probable cause showing and the inadmissible evidence as "contradicting" the showing. *See Collins v. Loisel*, 259 U.S. 309, 316-17 (1922) (Brandeis, J.); *Charlton v. Kelly*, 229 U.S. 447, 462 (1913).[10] While the distinction between contradictory and explanatory evidence has sometimes been elusive, it is plain that evidence that does not explain away, point to infirmities in or relate to the probable cause showing is not admissible. Thus, evidence about defenses such as insanity, *Charlton v. Kelly*, 229 U.S. 447, 462 (1913), or alibi, *Shapiro v Ferrandina*, 478 F.2d 894, 901 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973), or evidence "that someone other than the relator committed the offense", 2 M. Bassiouni, *International Extradition: United States Law and Practice* §5.5.1, at 558 (2d rev. ed. 1987), is inadmissible. And in

---

[10] Indeed, the extradition court in this very case held that contradictory evidence could not be admitted in the extradition hearing. *In re Demjanjuk*, 603 F. Supp. 1463, 1464-65 (N.D. Ohio 1984).

cases where evidence rebutting probable cause is admitted, it is done under limited circumstances — the evidence must "negate" or "obliterate" the factual showing of probable cause. *See In re Sindona*, 450 F. Supp. 672, 685 (S.D.N.Y. 1978) (evidence is only admissible if it "negat[es] a showing of probable cause"), *aff'd sub nom. Sindona v. Grant*, 619 F.2d 167 (2d Cir. 1980); *Shapiro v. Ferrandina*, 355 F. Supp. 563, 572 (S.D.N.Y.) (evidence is only admissible if it "tends to obliterate probable cause"), *modified*, 478 F.2d 894 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973); *Freedman v. United States*, 437 F. Supp. 1252, 1266 (N.D. Ga. 1977). The *Shapiro* court further held that "[t]he improbability or the vagueness of [probable cause] testimony may destroy the probability of guilt, *but the tendering of witnesses who testify to an opposite version of the facts does not.*" 355 F. Supp. at 572 (emphasis added).

The reason for such a rule is clear: the whole purpose of extradition is to avoid having the requesting nation try its case in two forums — in the United States and in its own courts. As a matter of comity, such a process would be improper .

The probable cause showing in Demjanjuk's extradition proceeding consisted of three eyewitness affidavits of Treblinka survivors, identifying Demjanjuk as the Treblinka guard Ivan the Terrible. 612 F.Supp. at 566. The purportedly exculpatory evidence consisted of statements of deceased Treblinka guards, which suggest that Ivan Marchenko, not Ivan Demjanjuk, might have been Ivan the Terrible, and an incomplete list of Treblinka guards on which Demjanjuk's name is absent. 10 F.3d at 350-51. None of the purportedly exculpatory materials relates to the eyewitness testimony at all. They do not "explain ambiguities or doubtful elements in the prima facie case." *Collins*, 259 U.S. at 315-16. They at best "testify to an opposite version of the facts," a version in which another person, not Demjanjuk, *might* be Ivan the Terrible of Treblinka. Such evidence does not "negate" or "obliterate" probable

cause as the cases require,[11] and is, accordingly, not admissible.[12]

Furthermore, there is no reason to believe that the purportedly exculpatory evidence could lead to admissible evidence. The declarants were dead and could not have testified at the extradition hearing. The documents could not be used for cross-examination purposes because the probable cause showing was based on affidavits— a perfectly proper procedure in an extradition case where the probable cause showing may be made on hearsay. 18 U.S.C. § 3091.

The rule set forth by this Court in *Brady*, which requires a prosecutor to produce, upon request, evidence favorable to a criminal defendant, is limited to the production of evidence which "is *material* either to guilt or to punishment." *Id.* at 104 (emphasis

---

[11] For this reason, the Sixth Circuit lacked jurisdiction to proceed it this matter. As this Court has stated, habeas review of an extradition order "is available only to inquire [1] whether the magistrate had jurisdiction, [2] whether the offense charged is within the treaty and, by a somewhat liberal extension, [3] *whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.*" *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925) (emphasis added). *See also Demjanjuk*, 776 F.2d at 576.

[12] The evidence would also have been inadmissible in the extradition hearing because it consists of hearsay documents. This Court has held that such evidence is inadmissible when offered by the accused. *In re Luis Oteiza y Cortes*, 136 U.S. 330 (1890). That principle has been sustained in a number of more recent cases, including the *Demjanjuk* extradition case. *See, e.g., United States v. Taitz*, 134 F.R.D. 288, 290 (S.D. Cal. 1991); *In re Koskotas*, 127 F.R.D. 13, 28 (D. Mass. 1989); *In re Demjanjuk*, 603 F. Supp. 1463, 1465 (N.D. Ohio 1984) (Demjanjuk not permitted to introduce evidence via affidavit); *United States ex rel. Karadzole v. Artukovic*, 170 F. Supp. 383, 388 (S.D. Cal. 1959) (*ex parte* affidavits submitted by accused were excluded). *See also First National City Bank of New York v. Aristeguiesta*, 287 F.2d 219, 226 (2d Cir. 1960) (dictum) (the opportunity afforded the demanding country to introduce *ex parte* depositions is not afforded the accused in an extradition proceeding), *vacated for mootness*, 375 U.S. 49 (1963).

added). In *Brady*, the Court found that because, under Maryland law, the favorable evidence in that case would not be *admissible* on the issue of guilt (but was relevant to punishment), the state court was correct in restricting the petitioner's retrial to the issue of punishment.

Hence, in order to trigger a Brady violation, the evidence not disclosed by the prosecution must not only be favorable, but also be admissible or lead to admissible evidence.[13] *See also United States v. Bagley*, 473 U.S. 667, 682 (1985) ("[E]vidence is material . . . if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.").[14]

Thus, even if *Brady* is applicable in extradition proceedings — a point on which *amici* take no position except to note that no other court of which we are aware has done so[15] and to note that the

---

[13] Indeed, the Sixth Circuit recognized this rule in *United States v. Philip*, 948 F.2d 241, 249 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1994 (1992). In that case, the court held that a *Brady* violation had not occurred when the prosecution in a criminal case did not produce a purportedly favorable videotape of an interview with one of the defendant's children, which would not have been admissible in the defendant's trial because the statements of the child were hearsay and the tape contained no information that might have led to admissible evidence.

[14] A similar rule applies with respect to discovery requests in an extradition. In a habeas corpus case, in which an extraditee asserted that the failure to provide him with certain discovery materials warranted granting him habeas relief, the court held: "Access to the requested discovery items would not have aided petitioner in challenging the critical rulings of the magistrate: that the charged offenses are covered by the treaty and that there is sufficient competent evidence to conclude that petitioner committed the crimes of which he is accused in Canada." *Peryea v. United States*, 782 F. Supp. 937, 940 (D. Vt. 1991), *aff'd w/o opn.*, 970 F.2d 896 (2d Cir. 1992).

[15] *See In re Koskotas*, 127 F.R.D. 13, 27 (D. Mass. 1989); *In re Singh*, 123 F.R.D. 108, 112 (D.N.J. 1987); *see also Caplan v. Vokes*, 649 F.2d 1336, 1342 n.10 (9th Cir. 1981) ("the accused [in an extradition proceeding] has no absolute right to introduce exculpatory evidence *and the government has no duty to do so* . . . .");

extradition to which this new doctrine applies was ordered nine years ago — *Brady* would not call for the production of the purportedly exculpatory evidence unless the nature of extradition proceedings were changed to make admissible evidence that is unrelated to the probable cause showing or unless *Brady* were expanded to require the production of inadmissible evidence or evidence that is unlikely to lead to admissible evidence.

Neither result is desirable. Restructuring extradition proceedings would turn such proceedings into full-blown trials, a result that this Court has repeatedly sought to avoid. In addition, allowing a virtual trial on the merits before extradition would put an undue burden on the requesting country.

Broadening *Brady* to include inadmissible evidence that is unlikely to lead to admissible evidence would be an exercise in futility. It makes no sense to require a prosecutor to produce evidence to a defendant in an extradition case that would do the defendant no good.

The Sixth Circuit's ruling would change the nature of an extradition proceeding from a hearing on a narrow issue — probable cause — into a full-blown criminal trial of the guilt or innocence of the person to be extradited. Such a result flies in the face of the precedents of this Court and other circuits and would radically restructure extradition proceedings in the United States, constitute a waste of judicial resources and not be properly deferential to the rights of the requesting country under the extradition treaty. The importance of this issue warrants this Court's review.

Merino v. United States Marshal, 326 F.2d 5, 13 (9th Cir. 1963) (holding *Brady* not applicable to extradition proceedings), *cert. denied*, 377 U.S. 997 (1964).

III.

THE SIXTH CIRCUIT'S CHARACTERIZATION OF CONTACTS BETWEEN THE JUSTICE DEPARTMENT AND JEWISH GROUPS AND INDIVIDUALS WARRANTS REVIEW BY THIS COURT

Amici are deeply concerned about the Sixth Circuit's characterization of the contacts between Jews and Jewish groups and OSI. Jews and Jewish groups — as well as non-Jews and non-Jewish groups — have been concerned about the presence of Nazi persecutors in the United States. As is their right, they have communicated with OSI and the Justice Department to ensure the efficient and effective handling of cases involving allegations of Nazi war crimes. Such contacts are perfectly normal.

It is commonplace for persons (including members of Congress) or groups interested in, for example, civil rights, women's rights or the environment, to contact the relevant units of the Justice Department to express their positions on policy or the handling of particular cases. This is true for supporters of John Demjanjuk as well.

The record is barren of any facts suggesting that Jews or Jewish groups urged OSI to withhold evidence, violate any law or rule of the court or win at any cost. In fact, the Special Master found that "pressures from outside OSI did not influence the [Government's] failure to disclose the required information." 10 F.3d at 354. Unless clearly erroneous, this finding must stand. Fed. R. Civ. Proc. 53(e)(2). Yet, without making any determination of error, the Sixth Circuit, in effect, overruled the finding.

The Sixth Circuit stated that "the presence of such pressure cannot be gainsaid." 10 F.3d at 354. (The word "such" is ambiguous — it refers either to outside pressure only or to pressure to withhold evidence.) The court went on to say:

> It is obvious from the record that the prevailing mindset at OSI was that the office must try to please and maintain very close relationships with various

> interest groups because their existence depended upon it.

Id. at 355. Without exception, the examples of interested parties cited by the Sixth Circuit were Jewish organizations and Jewish individuals .

According to the court, OSI's "attitude" was "to win at any cost." *Id.* The suggestion in the Sixth Circuit's decision that this purported attitude stemmed from pressure from Jewish groups and Jews[16] is contradicted by the finding of the Special Master.[17] *Amici* find the foregoing statements of the Sixth Circuit troubling because, regardless of intent and particularly because there is no basis in the

---

[16] The examples adduced by the Sixth Circuit to support its conclusion do no such thing. The court first cites a letter to the Attorney General from a Jewish Congressman, a former chair of the House Immigration Subcommittee. Although the letter states "we cannot afford the risk of losing" the Demjanjuk case, the context makes clear that his concern was about losing the case because of "lack of preparation and an inadequate understanding of the importance of the case." There is nothing in his letter calling for the Justice Department to violate the law or to withhold evidence or even, as the Sixth Circuit states, to prosecute Demjanjuk "hard." 10 F.3d at 354. Citing a lecture trip sponsored by ADL taken by Allan Ryan, Jr., the former director of OSI, three years after he left OSI, does not support the proposition that ADL urged OSI to withhold evidence or otherwise violate the law three years earlier or at any time. A former OSI director's statement that the Demjanjuk case was a "political hot potato" similarly does not prove that Jewish groups were asking OSI to adopt an "end justifies the means" approach to Nazi cases. Nor, finally, does Ryan's statement that the support of Jewish groups "cannot be taken for granted" imply that Jewish groups sought improper action by OSI.

[17] While the Court did not explicitly state that pressure from Jewish groups directly caused the Justice Department to withhold evidence, the juxtaposition of the Court's finding of pressure with (1) its conclusion that OSI needed to maintain very close relations "with [Jewish] groups because [OSI's] continued existence depended upon it, and (2) OSI's so-called "win at any cost" mindset creates the impression of a connection between these findings. 10 F.3d at 355.

record or in fact to support them, they serve to perpetuate the vicious stereotype that Jews wield inordinate and invidious power.

Courts must take special care not to nurture ethnic stereotypes. *See, e.g., Batson v. Kentucky*, 476 U.S. 79 (1986); *Georgia v. McCollum*, 112 S. Ct. 2348 (1992). *Amici*, therefore, urge that certiorari be granted under this Court's supervisory power over the lower federal courts for the purpose of reversing the Sixth Circuit on this point.

CONCLUSION

The Sixth Circuit has treated *Demjanjuk* as a special case, not subject to the jurisdictional or evidentiary restrictions of the ordinary extradition case. Unfortunately, such special treatment sets a precedent that can work untold mischief on the proper workings of extradition law. For the reasons set forth above and for the reasons set forth in the Petition, certiorari should be granted and the Sixth Circuit's decision should be reversed.

Respectfully submitted,

Elizabeth Holtzman
Counsel of Record
HERRICK, FEINSTEIN
2 Park Avenue
New York, NY 10016
(212) 684-1400

SANFORD HAUSLER
1568 59th Street
Brooklyn, NY 11219
(718) 633-0847

Attorneys for *Amici Curiae*

Dated: June 22, 1994

Supreme Court, U.S.
FILED
JUN 23 1994
OFFICE OF THE CLERK

No. 93-1875

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

R.H. RISON, *et al.*,

Petitioners,

v.

JOHN DEMJANJUK, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS (AMERICAN SECTION), AMERICAN JEWISH COMMITTEE, AMERICAN JEWISH CONGRESS, ANTI-DEFAMATION LEAGUE, B'NAI B'RITH, NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS, THE SIMON WIESENTHAL CENTER, SOCIETY OF SURVIVORS OF THE RIGA GHETTO, INC., UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, WORLD JEWISH CONGRESS, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

NATHAN LEWIN
(Counsel of Record)
MILLER, CASSIDY,
LARROCA & LEWIN
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

Attorney for the Amici Curiae

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

18 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICI CURIAE 2

ARGUMENT 7

I. The Historic Decision of a Panel of the Sixth Circuit Should Receive Some Form of Appellate Review 7

II. The Sixth Circuit's Standard Unjustifiably Casts Doubt on the Office of Special Investigations 10

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Robertson,
882 F.2d 421 (9th Cir. 1988) 11

Aoude v. Mobil Oil Corp.,
892 F.2d 1115 (1st Cir. 1989) 11

Demjanjuk v. Petrovsky,
10 F.3d 338 (6th Cir. 1993) . . . . . *passim*

Fernandez v. Phillips,
268 U.S. 311 (1925) 9

Great Coastal Express, Inc. v. International Brotherhood of Teamsters,
675 F.2d 1349 (4th Cir. 1982) 11

In the Matter of John Demjanjuk,
603 F. Supp. 1463 (N.D. Ohio 1984) 9

Lockwood v. Bowles,
46 F.R.D. 625 (D.D.C. 1969) 11

Pfizer, Inc. v. International Rectifier Corp. (In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions),
538 F.2d 180 (8th Cir. 1976) 11

Sacher v. United States,
343 U.S. 1 (1952) 9

Wilson v. Johns-Manville Sales Corp.,
873 F.2d 869 (5th Cir. 1989) 11

STATUTES AND RULES

18 U.S.C. § 401 9

Fed. R. Civ. P. 60(b) . . . . . *passim*

Fed. R. Crim. P. 42(b) 9

Sup. Ct. R. 10.1 (a) 9

Sup. Ct. R. 37.2 7

OTHER AUTHORITIES

11 Charles A. Wright
& Arthur R. Miller,
Federal Practice and Procedure
§ 2870, at 255 (1973) 11

No. 93-1875

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

R. H. RISON, ET AL., *Petitioners*,
v.
JOHN DEMJANJUK, ET AL., *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS (AMERICAN SECTION), AMERICAN JEWISH COMMITTEE, AMERICAN JEWISH CONGRESS, ANTI-DEFAMATION LEAGUE, B'NAI B'RITH, NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS, THE SIMON WIESENTHAL CENTER, SOCIETY OF SURVIVORS OF THE RIGA GHETTO, INC., UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, WORLD JEWISH CONGRESS, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICI CURIAE

The International Association of Jewish Lawyers and Jurists (American Section) (hereinafter "IAJLJ") is a membership organization consisting of attorneys and judges in more than 32 countries around the world. Its founder was retired Justice Haim Cohn of the Supreme Court of Israel, and its Honorary President, until his death, was former Justice Arthur J. Goldberg. The American Section was organized in 1983 by members of the American Jewish legal community to defend Jewish interests and human rights in the United States and abroad.

Among the IAJLJ's concerns has been the identification and legal prosecution of those who participated in the genocide of the Jewish people during the Second World War. Our interest extends beyond the punishment of particular guilty individuals. We are also concerned with the verdict of history.

The public trial given to John Demjanjuk in Israel, followed by the meticulous scrutiny of the appellate record by the Supreme Court of Israel and that court's willingness to consider evidence that was not available at the time of the trial demonstrate the scrupulousness with which Demjanjuk was tried. The Supreme Court of Israel determined that the later-obtained documents created a doubt as to whether Demjanjuk was, in fact, "Ivan the Terrible" of Treblinka to warrant reversal of the judgment of conviction. His death sentence was vacated and Demjanjuk was released from custody in Israel. That is the nature of due process, and that court's judgment is the outcome of fair procedures. We are troubled, however, by the Sixth Circuit's *sua sponte* decision to reopen the extradition case in the United States. Its

rulings have skewed the process and produced an unjust result.

As lawyers and jurists we place an exceedingly high value on due process of law, and as Jews we are firmly committed to the Biblical doctrine: "Justice, justice shalt thou pursue." The recent decisions that have been rendered in this case by the Sixth Circuit do not, in our view, achieve justice.

We are filing this brief to support the request of the United States that a writ of certiorari be granted in this case. The reasons we have stated do not, we believe, duplicate the reasons supporting certiorari stated by the Solicitor General.

* * *

The American Jewish Committee believes deeply that those who aided or abetted Nazi war criminals must not receive sanctuary in the United States. We believe, too, that there is strong evidence that the respondent, John Demjanjuk, served the Nazi cause as a guard in a Nazi concentration camp and lied about his record when he sought refuge in the United States. Hence, we were dismayed at the decision *sua sponte* of the Sixth Circuit panel to reopen the extradition case against Demjanjuk on the ground of alleged prosecutorial misconduct. This ruling surely merits review. That is why we join in urging that the petition for certiorari be granted.

* * *

American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, political, economic and religious rights of Americans. In 1933, it was

the first Jewish organization to sound the alarm about the rise of Nazism, organizing a boycott of German-made goods. Since the end of World War II, American Jewish Congress has steadfastly sought the expulsion of Nazi criminals who have entered the country surreptitiously. Because the opinion below treats this wholly legitimate objective as if it were improper, tainting the prosecutorial processes, American Jewish Congress seeks leave to file this brief.

* * *

The Anti-Defamation League ("ADL") was organized in 1913 to stop the defamation of the Jewish people and to secure justice and fair treatment for all. To advance these goals, ADL seeks goodwill and mutual understanding among Americans of all creeds and races and works to combat racial and religious prejudice and the deprivation of civil liberties.

From the beginnings of the unprecedented genocide committed by the Nazis against the Jewish people and other groups, the League has opposed Nazism in all its forms and activities. Following World War II, the League has sought to expose the perpetrators of those crimes against humanity and bring them to justice.

ADL has a keen interest in *Rison v. Demjanjuk* because the opinion below contains factual distortions regarding the Office of Special Investigations' relationship with ADL and with the American Jewish community and inaccurately implies that there was an inappropriate relationship between these groups.

* * *

B'nai B'rith is the world's largest Jewish social service organization with members in 51 countries. B'nai B'rith is committed to the pursuit of justice, protection of human rights, and the combatting of bigotry, hatred, and prejudice, wherever and in whatever form it may exist or be applied. B'nai B'rith is dedicated to promoting Jewish unity, preserving Jewish continuity, and protecting Jewish security. For these reasons, B'nai B'rith asks this Court to grant certiorari in this case.

* * *

The National Jewish Commission on Law and Public Affairs ("COLPA") is a national organization of volunteer lawyers and social scientists dedicated to combatting all forms of religious prejudice and discrimination and to representing the position of the nation's Orthodox Jewish community before courts, legislatures, and other governmental bodies. COLPA has filed numerous briefs *amicus curiae* in this Court and in the nation's courts of appeals in cases of importance to the Orthodox Jewish community.

COLPA joins in support of the petition for certiorari in this case because the actions of the court of appeals have unjustifiably cast a pall upon the exemplary program of the United States government seeking the expulsion of Nazi war criminals who improperly entered the United States. COLPA believes that the court of appeals' decision *sua sponte* to reopen the Demjanjuk extradition case and the conclusions it ultimately reached were plainly not supported by the record. COLPA therefore respectfully submits that the interests of justice would be served by the Court's review of this very troubling matter.

* * *

The Simon Wiesenthal Center, founded in 1977 and named for the famed Nazi hunter, is the largest private group in the United States devoted to teaching the lessons of the Holocaust. It has more than 400,000 member families and conducts research and provides education about the genocide committed against the Jewish people by the Nazis in World War II. In the past, the Center and its staff has assisted the governments of Argentina, Canada, France, Israel, Italy, Germany, Russia, the United Kingdom, and the United States in the investigation and prosecution of individuals accused of being war criminals.

* * *

Society of Survivors of the Riga Ghetto, Inc. is an organization of survivors of World War II's Nazi genocide. The Society of Survivors is dedicated to ensuring justice for the victims of heinous human rights violations committed during the Holocaust. It is of utmost concern to the Society of Survivors that Nazi war criminals such as John Demjanjuk are not permitted to remain in this country.

* * *

The Union of Orthodox Jewish Congregations of America is a membership organization of close to one thousand Orthodox Jewish synagogies in the United States that advocates the interests and concerns of Orthodox Jews in public fora.

We declare our interest in joining the International Association of Jewish Lawyers and Jurists' *amicus* brief because we find the August 3, 1993 decision of the Sixth

Circuit Court of Appeals ordering the Federal government to allow John Demjanjuk to return to the United States a cause for deep dismay. According to existing United States immigration law, there is no reason or valid basis to return John Demjanjuk to the United States.

* * *

In 1942, the World Jewish Congress was the agency that first revealed, to an unbelieving world, the Nazi plan for the "final solution" of the Jewish people. Today the Congress is the representative body of Jewish communities in more than eighty countries and works to pursue the struggle for human rights everywhere and for the rights and status of Jews wherever they may be threatened. This case presents such a struggle, and the Congress hereby declares its interest that justice be served.

Pursuant to Supreme Court Rule 37.2, *amici curiae* have obtained the consent of all parties in this action to the filing of this brief in support of petitioners. Letters of consent are on file with the Clerk of this Court.

ARGUMENT

I

THE HISTORIC DECISION OF A PANEL OF THE SIXTH CIRCUIT SHOULD RECEIVE SOME FORM OF APPELLATE REVIEW

On June 5, 1992, the Sixth Circuit panel issued an order *sua sponte* based on information that "had come to the attention" of the Court suggesting that its affirmance in 1985

of the denial of habeas corpus challenging the extradition of respondent was "improvident." The panel ordered counsel to appear for a hearing on a number of questions that it propounded.

The panel thereafter appointed a Special Master, District Judge Thomas Wiseman, who held hearings, took evidence, and made extensive findings. In the decision now under review, the panel rejected the conclusions of the Special Master (although it declined to overturn the Special Master's factual findings that the Department of Justice's Office of Special Investigations ("OSI") attorneys had acted in good faith) and held that "prosecutorial misconduct that constituted fraud on the court" invalidated the extradition proceeding. The full Sixth Circuit thereafter denied the United States' suggestion for rehearing *en banc*.

The historic decision of the panel deserves appellate review. It has received none. This proceeding was initiated by a panel of three Circuit Judges who believed from the outset, from information apparently obtained through the media, that they were "misled" by "prosecutorial misconduct."

Whether there is basis in fact and law for the belief that led the panel to initiate this phase of the proceeding and to set aside its own prior decision should not remain wholly unreviewed. This is especially true since the panel significantly lowered the standard required to satisfy the extraordinary "fraud on the court" remedy provided by Federal Rule of Civil Procedure 60(b), in conflict with every other Circuit Court to have considered the question. That legal issue presented by the Solicitor General's petition deserves review. By its decision to reopen the extradition case and demand explanations from the Department of

Justice, the panel went far beyond the power that American courts have in international extradition cases, where the accepted standard is only whether there is probable cause to believe that the accused has committed an extraditable offense. *E.g.*, *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925); *In the Matter of John Demjanjuk*, 603 F. Supp. 1463, 1464 (N.D. Ohio 1984). Clearly, the Sixth Circuit panel "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 10.1 (a).

A parallel that comes to mind is a contempt proceeding for violation of a court order outside the presence of the court. A judge is permitted to initiate a contempt proceeding and to preside over the determination as to whether contempt was committed. 18 U.S.C. § 401; Rule 42(b), Fed. R. Crim. P. But it would be extraordinary to give the last word on this issue to the judge who finds that his own order has been violated. The mere possibility of such an unreviewable judgment would be an invitation to injustice. Indeed, this Court in *Sacher v. United States*, 343 U.S. 1 (1952), held that the contempt power can be summarily exercised by a trial judge *only* because there will be some kind of review. "The profession knows that no lawyer is at the mercy of a single federal trial judge. This case demonstrates that before punishment takes effect he may have appeal on law and fact to the Court of Appeals." 343 U.S. at 12-13.

This case deserves the "supervisory authority" of this Court. The Sixth Circuit panel deliberately turned itself into a court of first instance with regard to the issues raised by its *sua sponte* order of June 5, 1992. It did *not* remand the case to the district court that had originally heard the extradition proceeding for it to render a trial-court judgment on the

issues presented, subject to appellate review by a randomly selected panel of the Sixth Circuit. Instead, the panel retained jurisdiction and chose a Special Master. It assigned to the Special Master tasks that are ordinarily assigned *by district courts* to Special Masters. Consequently, the Sixth Circuit decision should be treated as the decision of a court of first instance.

This is a lawsuit that has international repercussions and serious implications for history. If this Court were to leave the panel's decision unreviewed, the American public, the international community, and the survivors of the Holocaust -- as well as the Department of Justice attorneys who have been branded as perpetrators of "prosecutorial misconduct" -- would effectively be deprived of any appellate review whatsoever of the panel's determination. And, what concerns these *amici* particularly, the judgment of history concerning the proceedings brought against John Demjanjuk in the United States would be left with a wholly unjustified stain.

The judgment that is recorded for all time in the pages of history should be the judgment of the highest court in the land and not the unreviewed conclusion of a panel of three Circuit Judges who themselves initiated the proceeding and then retained jurisdiction over it.

II

THE SIXTH CIRCUIT'S STANDARD UNJUSTIFIABLY CASTS DOUBT ON THE OFFICE OF SPECIAL INVESTIGATIONS

The panel of the Sixth Circuit stated its understanding of "fraud on the court" as follows: "Although there are

cases holding that a 'plan or scheme' must exist in order to find fraud on the court, we agree with Judge Wiseman that a scheme, based on a subjective intent to commit fraud, is not required in a case *such as this*. Reckless disregard for the truth is sufficient." 10 F.3d at 352-53 (emphasis added).

The court invoked the saving clause of Federal Rule of Civil Procedure 60(b) -- "This rule does not limit the power of a court . . . to set aside a judgment for fraud upon the court." But it failed to realize that this is an *extraordinary* remedy. There is no time limitation on the court's power to invalidate civil judgments because of "fraud on the court." The extraordinariness of the remedy requires extraordinary conduct.

Most courts of appeals have limited the "fraud on the court" remedy to "the most egregious conduct involving a corruption of the judicial process itself." 11 Wright & Miller, Federal Practice and Procedure § 2870, at 255 (1973) (quoting *Lockwood v. Bowles*, 46 F.R.D. 625, 632 (D.D.C. 1969)). Indeed, the First, Fourth, Fifth, Eighth, and Ninth Circuits have concluded that the power to set aside a judgment for "fraud on the court" cannot be exercised without proof of a "plan" or "scheme" to defraud. [1] Such formulation "unmistakably requires intentional misconduct." Pet. for Cert. 16.

---

[1] *See, e.g. Aoude v. Mobil Oil Corporation*, 892 F.2d 1115, 1118 (1st Cir. 1989); *Great Coastal Express, Inc. v. International Brotherhood of Teamsters*, 675 F.2d 1349, 1356 (4th Cir. 1982); *Wilson v. Johns-Manville Sales Corp.*, 873 F.2d 869, 872 (5th Cir. 1989); *Pfizer, Inc. v. International Rectifier Corp.* (In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions), 538 F.2d 180, 195 (8th Cir. 1976); *Alexander v. Robertson*, 882 F.2d 421, 425 (9th Cir. 1988).

The Sixth Circuit found that it need not follow the subjective intent standard in a case "such as this." Nothing, in our view, warrants relaxing the legal standard for reopening a judgment entered in a denaturalization, deportation or extradition hearing. Indeed, the difficulties ordinarily encountered by the Department of Justice's Office of Special Investigations warrant a more severe standard of proof than the loose standard formulated in this case.

The important work of OSI is to insure that the United States not serve as a safe haven for those who participated in the massive crime against humanity known as the Holocaust. From historical documents and interviews with Holocaust survivors, OSI attorneys investigate and, when appropriate, take legal action against individuals who were admitted as aliens into, or became naturalized citizens of, the United States and who had assisted the Nazis in their genocide of racial and ethnic and religious communities.

The Sixth Circuit panel expressly declined to overturn the Special Master's finding that OSI attorneys "'did not intend to violate the Rules or their ethical obligations . . . they did not misstate facts or the law as they understood them, and did not make statements in ignorance while aware of their ignorance. Although they were blinded to what we may now perceive to be the truth, they were not wilfully blind.'" 10 F.3d at 349.

The Sixth Circuit's holding that the OSI attorneys have perpetrated a "fraud on the court" despite their "good faith" conduct will unjustifiably chill the activity of that office. The work of OSI entails sifting through archival materials in this country and abroad, and depends on the accuracy of witness identifications. Under exceedingly difficult conditions, OSI attorneys, acting in good faith, have

succeeded admirably in applying rules of American law to the unusual situation of foreign war criminals who covertly sought refuge in this country. They do not deserve the cloud on their integrity that the panel of the Sixth Circuit has created. [2]

Should the Sixth Circuit's standard be permitted to stand, it will encourage collateral attacks on other concluded proceedings against Nazi war criminals. Dubious new testimony is now available from Eastern European countries that previously had been closed societies. Zealous and energetic friends and attorneys of those who have been accused and judged can turn up documents of questionable relevance or authenticity to try to impugn final judgments that are otherwise supported by strong evidence. In the Sixth Circuit, they need now show only an omission here or a misstatement there to justify the finding of a "fraud on the court." With such challenges may come increased false assertions that the Holocaust never happened or that the prosecution of war criminals was motivated only by political considerations. The American judicial system should not lend its authority and its dignity to these historical falsehoods.

---

[2] The Sixth Circuit panel also implied gratuitously that OSI had been improperly influenced by Jewish organizations, including *amicus* Anti-Defamation League, notwithstanding the Special Master's finding to the contrary. 10 F.3d at 354-55. This aspersion on the integrity of both OSI and Jewish organizations is wholly unwarranted.

CONCLUSION

For the foregoing reasons, this Court should grant the writ of certiorari in this case and review the judgment of the Sixth Circuit.

Respectfully submitted,

NATHAN LEWIN
(Counsel of Record)
MILLER, CASSIDY, LARROCA
& LEWIN
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

Attorney for the
Amici Curiae

No. 93-1875

Supreme Court, U.S.
FILED
AUG 5 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

R. H. RISON, ET AL., PETITIONERS

v.

JOHN DEMJANJUK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

Cases:	Page
Abatti v. *C.I.R.*, 859 F.2d 115 (9th Cir. 1988)	4
Brady v. *Maryland*, 373 U.S. 83 (1963)	3
Collins v. *Loisel*, 259 U.S. 309 (1922)	3
Custis v. *United States*, 114 S. Ct. 1732 (1994)	10
Edwards v. *Travelers Insur.*, 563 F.2d 105 (6th Cir. 1977)	4
Glucksman v. *Henkel*, 221 U.S. 508 (1911)	3
Great Coastal Express, Inc. v. *International Bhd. of Teamsters*, 675 F.2d 1349 (4th Cir. 1982), cert. denied, 459 U.S. 1128 (1983)	4
Nickerson v. *Matco Tools Corp.*, 813 F.2d 529 (1st Cir. 1987)	4
Sandberg v. *Virginia Bankshares, Inc.*, 979 F.2d 332 (4th Cir. 1992)	4
United States v. *Demjanjuk*, 518 F. Supp. 1362 (N.D. Ohio 1981), aff'd, 680 F.2d 32 (6th Cir.), cert. denied, 459 U.S. 1036 (1982)	6, 9
United States v. *Throckmorton*, 98 U.S. 61 (1878)	3
Virgin Islands Housing Auth. v. *David*, 823 F.2d 764 (3d Cir. 1987)	4
Rules:	
Fed. R. Civ. P.:	
Rule 53(e)	2
Rule 60(b)	1, 2, 4, 5, 10
Miscellaneous:	
3 E. Devitt, C. Blackmar & M. Wolff, *Federal Jury Practice and Instructions* (4th ed. 1987)	4
2 F. Harper, F. James, Jr. & O. Gray, *The Law of Torts*, (2d ed. 1986)	4
Model Penal Code § 2.02(2)(c) (1962)	4
Restatement (Second) of Torts:	
1965	4
1977	4

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1875

R. H. RISON, ET AL., PETITIONERS

v.

JOHN DEMJANJUK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

---

1. Our petition seeks review of the court of appeals' ruling that government attorneys who acted in good faith during litigation against respondent nevertheless committed fraud on the court. As we explain in the petition, that ruling cannot be squared with the language of Fed. R. of Civ. P. 60(b) and the decisions of eight other judicial circuits. The decision below not only creates conflicting legal standards among the circuits, but it will also spawn new litigation over old cases. Because Rule 60(b) allows a court to overturn a final judgment for fraud on the court at any time, the court of appeals' decision will broadly undermine the finality of judgments.

a. Respondent turns to the issue presented in our petition only in the latter pages of his brief. He attempts to distinguish the numerous conflicting decisions based on the subject matter of this particular suit. According to

respondent, the court of appeals properly applied a different standard for fraud on the court in this case than it would have employed in a case "involving routine civil litigation between private parties" (Br. in Opp. 26), because the denaturalization and extradition proceedings are "quasi-criminal" in nature and they involve government attorneys (*id.* at 27-28).

Respondent's effort to bridge the conflict created by the court of appeals' decision ignores a fundamental fact—the court did not rely on any such distinction. Instead the court invoked its general power, recognized in Rule 60(b), to redress fraud on the court. See Pet. App. 25a-26a, 41a-42a. And the general principle the court announced is incorrect. Simply put, a party—whether governmental or private, whether acting in a criminal, "quasi-criminal," or civil capacity—cannot commit fraud on the court unless that party acts with fraudulent intent. Here, the special master found that the government attorneys "acted in good faith," *id.* at 263a, and the court of appeals did not disturb that finding, see *id.* at 25a-26a. In every other court of appeals that has addressed the question, the special master's finding of good faith would compel the conclusion that the government did not commit fraud on the court. See Pet. 15-17.[1]

---

[1] Respondent takes issue (Br. in Opp. 1 n.1) with our statement (Pet. 12) that the court of appeals did not disturb the special master's finding that the government attorneys acted in good faith. Fed. R. Civ. P. 53(e)(2) requires the court of appeals to "accept the master's findings of fact unless clearly erroneous." The court of appeals acknowledged its obligation under Rule 53(e)(2) (see Pet. App. 5a), and it accepted the special master's findings, including the finding that the government attorneys acted in good faith. In particular, the court took as a premise for its decision "the Special Master's finding of no deliberate or wilful failure to disclose information arising from an evil motive." Pet. App. 25a-26a. Although the court suggested that the government attorneys had deliberately withheld information, it "accept[ed] as true that no OSI attorney deliberately withheld from [respondent] or the court information that he believed he had a duty to disclose" (*id.* at 26a).

b. None of the specific factors that respondent cites can convert good faith conduct into fraud on the court. Respondent correctly observes (Br. in Opp. 28) that government attorneys have an obligation to adhere to the highest standards of conduct, but that obligation should not expose government attorneys to censure for committing fraud on the court when they acted without fraudulent intent. Respondent's related observation that some of the conflicting cases we cite did not involve attorneys (*id.* at 29) also misses the point. The question in every case is whether a participant in the litigation intended to deceive the court. If the participants acted in good faith, then the courts should not use the doctrine of fraud on the court to reopen long final judgments.[2]

c. Respondent argues (Br. in Opp. 31-33) that the court of appeals' use of a standard that allows a finding of fraud on the court based on a "reckless indifference" to the truth is consistent with common law definitions of fraud and thus is appropriate in setting the standard for fraud on the court. We

---

[2] Respondent notes (Br. in Opp. 27) that the court of appeals invoked this Court's decision in *Brady* v. *Maryland*, 373 U.S. 83 (1963), and that *Brady* employs an objective standard. But not every *Brady* violation constitutes fraud on the court; at a minimum, the government must intentionally violate its *Brady* obligations. See Pet. 20 n.15. In this case, the United States supported Israel's extradition request on the basis of sworn affidavits and testimony of six survivors of the Treblinka death camp who identified respondent as a Ukrainian guard named Ivan who operated the gas chambers. Pet. 4. That testimony amply established probable cause justifying respondent's extradition. Hence, even if the information involved here had been admissible in the extradition proceeding (see *Collins* v. *Loisel*, 259 U.S. 309, 315-317 (1922)), it would not have affected the outcome of that proceeding. See *Glucksman* v. *Henkel*, 221 U.S. 508, 512 (1911). See Pet. 20-22. Respondent's theory that the government attorneys broke a discovery "promise" (Br. in Opp. 30, citing *United States* v. *Throckmorton*, 98 U.S. 61 (1878)) is similarly without merit and was specifically rejected by the special master. See Pet. App. 254a-255a.

disagree with that argument for reasons summarized in our petition (at 17-22). As we explain therein, Fed. R. Civ. P. 60(b) differentiates between fraud on the court, which may be raised at any time, and "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct," which must be raised within one year of judgment.[3] Moreover, the court of appeals' definition of recklessness conflicts with settled law regarding the scienter required to show even common law fraud. Under the common law test for reckless misrepresentation, a party commits fraud if "being *conscious* that he has neither knowledge nor belief in the existence of the matter *he chooses to assert it as a fact*." Restatement (Second) of Torts § 526, comment e (1977) (emphasis added).[4]

---

[3] Recognizing that distinction, courts of appeals have consistently stated that fraud on the court requires proof of a deliberate scheme to defraud. See, *e.g.*, *Abatti* v. *C.I.R.*, 859 F.2d 115, 118 (9th Cir. 1988); *Great Coastal Express, Inc.* v. *International Bhd. of Teamsters*, 675 F.2d 1349, 1356 (4th Cir. 1982), cert. denied, 459 U.S. 1128 (1983). Only the Third Circuit has suggested that a party who acted recklessly can be found to have committed fraud on the court, and that court held only that a misrepresentation made with "callous disregard" of the record can support such a finding. See *Virgin Islands Housing Auth.* v. *David*, 823 F.2d 764, 767 (3d Cir. 1987).

[4] See, *e.g.*, *Sandberg* v. *Virginia Bankshares, Inc.*, 979 F.2d 332, 345 (4th Cir. 1992); *Nickerson* v. *Matco Tools Corp.*, 813 F.2d 529, 531 (1st Cir. 1987); *Edwards* v. *Travelers Insurance*, 563 F.2d 105, 111 (6th Cir. 1977); see also 3 E. Devitt, C. Blackmar & M. Wolff, *Federal Jury Practice and Instructions* § 83.05 (4th ed. 1987); cf. Model Penal Code § 2.02(c) (1962). The court of appeals instead relied on the definition of recklessness contained in a comment to the Restatement (Second) of Torts § 500 (1965), which addresses "Reckless Disregard for Safety"—not misrepresentation. See Pet. App. 26a. By employing the objective standard of recklessness articulated in that quite different setting, the court of appeals has allowed a finding of fraud on the court to rest on mere negligence. See 2 F. Harper, F. James, Jr. & O. Gray, *The Law of Torts* § 7.3, at 391-392 (2d ed. 1986).

In this case, the special master found—and the court of appeals did not dispute—that the government attorneys "did not misstate facts or the law as they understood them, and did not make statements in ignorance while aware of their ignorance. Although they were blinded to what we now perceive to be the truth, they were not willfully blind." Pet. App. 263a. Those findings preclude the conclusion that the government attorneys acted with conscious disregard for the truth. Thus, even if "recklessness" could constitute fraud on the court within the meaning of Rule 60(b), the government attorneys were not reckless.

2. Although respondent eventually engages our legal arguments with the contentions we have just addressed, he expounds first and foremost upon the "grave injustice" (Br. in Opp. 2) that he claims to have suffered in this case. Respondent's emotive accusations are not well founded in fact and in no way diminish the need for this Court's review of the important legal issue that we present. Respondent's lengthy narrative simply seeks to revive factual contentions that the special master put to rest.

a. Respondent challenges our statement that he, "like other Soviet soldiers captured by the Germans, had been transferred to an SS training camp in Trawniki, Poland." Br. in Opp. 1 n.1, quoting Pet. 2. His denial that "he had ever been at the Trawniki training camp or the Sobibor death camp" (Br. in Opp. 1 n.1) is flatly contradicted by the evidence and previous judicial findings. In the denaturalization proceedings, the district court determined that respondent's Trawniki identification card established that he served at Trawniki, and the court of appeals affirmed that finding. See *United States* v. *Demjanjuk*, 518 F. Supp. 1362, 1385-1386 (N.D. Ohio 1981), aff'd, 680 F.2d 32 (6th Cir.), cert. denied, 459 U.S. 1036 (1982). After extensive litigation, the Israeli courts

reached the same conclusion.[5] Most recently, the special master found that "[n]othing uncovered in these proceedings, or, indeed, in the twelve years since Judge Battisti's decision in the denaturalization case, has cast any substantial doubt on his finding that [respondent] served in the German SS at the Trawniki training camp." Pet. App. 266a.[6]

b. Respondent's account of the government's purported misdeeds—in which he cites "ten examples" of "misconduct and fraud" (Br. in Opp. 3)—basically rests on the contention that government attorneys concealed documents indicating that Marchenko, not respondent, was "Ivan the Terrible." Pet. App. 3a. The special master found that none of those "examples" amounted to fraud on the court (*id.* at 250a-258a). The court of appeals based its finding of "recklessness" on three items of evidence: (i) the Fedorenko protocols (which include an excerpt of the 1945 record of interrogation of Treblinka guard Pavel Leleko, given prior to his execution, and a 1978 statement of former Treblinka guard Nikolai Malagon); (ii) a Polish article about Treblinka; and (iii) internal reports concerning Otto Horn's identification of re-

---

[5] The Israeli trial court found that the identification card was genuine and that it established respondent's service at Trawniki. Gov't C.A. App. 578-610. While respondent's appeal to the Supreme Court of Israel was pending, extensive new documentary evidence surfaced that confirmed respondent's Trawniki service. That evidence includes five original German documents identifying respondent by his Trawniki identification number and reflecting his service at the Sobibor death camp and the Maidanek and Flossenburg concentration camps. See Isr. S. Ct. Dec. ¶ 152 (English translation at 128-129; Hebrew original at 107-108). Relying on the identification card and the new evidence, the Supreme Court of Israel confirmed the trial court's decision that respondent served at Trawniki. Isr. S. Ct. Dec. ¶¶ 80-163, 447, 458-461 (English translation at 65-137, Final Portion at 1-2, 20-29; Hebrew original 59-113, 383-384, 393-398).

[6] Significantly, respondent never asserted before the special master that the government committed fraud in presenting the Trawniki evidence, and the court of appeals did not address the matter. Pet. App. 41a-42a.

spondent's photographs. Pet. App. 27a-31a. The special master correctly concluded that none of those three items was fraudulently withheld; instead, they were not disclosed because the government attorneys acting in good faith did not recognize or believe that they should be disclosed. See Pet. 7-10; Pet. App. 250a-258a.

i. As the special master explained, the government attorneys did not perceive the Fedorenko protocols as exculpatory in light of other information in their possession. See Pet. App. 159a-167a. Although the protocols identified a gas chamber motorist named Marchenko (*id.* at 162a-163a), the sum of the available information—including the second Malagon statement—established for those attorneys that Marchenko's first name was Nikolai and that he therefore was not "Ivan the Terrible." See *ibid.*; *id.* at 166a-167a.[7] The special master specifically found that the government attorneys "did not believe that they possessed and withheld exculpatory information" (*id.* at 243a) and further found that they "had a good faith belief that they had met their discovery obligations" (Pet. App. 258a). See Pet. 20-22.[8]

---

[7] As the special master observed, the Leleko statement provided the names Marchenko and Nikolai, but it did not "refer to Ivan's notorious acts [and] provided nothing to connect the two names with either Ivan the Terrible or Ivan Demjanjuk." Pet. App. 259a. The protocols themselves do not mention any guard named Ivan. See *id.* at 58a-59a (Leleko excerpt); Gov't C.A. App. 149 (Malagon statement); Pet. App. 64a (reprinted version of Malagon statement).

[8] Respondent argues (Br. in Opp. 17-18) that Norman Moscowitz wrongly withheld the Fedorenko protocols in May 1981 in response to his opposing counsel's "impassioned plea" for information about "Ivan the Terrible." As the special master explained (Pet. App. 163a-167a), in late 1979, Moscowitz considered the possibility that respondent had used the alias Marchenko at Treblinka, or that Marchenko was yet another guard named Ivan. But he rejected both possibilities in the winter of *1980*, after receiving Nikolai Malagon's second statement identifying two gas chamber operators: "Nikolai Marchenko" and "Ivan Demedyuk or Ivan

ii. Respondent's arguments concerning disclosure of the Polish article about Treblinka (Br. in Opp. 8-12) stand on even weaker footing, because the special master found that the government had provided respondent with an English translation of that article in August 1982—more than three years before respondent's extradition to Israel. See Pet. 8, 13 n.10; Pet. App. 129a-130a, 199a-200a. Respondent concedes that the court of appeals erred in stating that the government did not disclose the article until 1992 (Br. in Opp. 10, 12 n.17), but he asserts that "the Polish material without the [Fedorenko] protocols was much less significant." *Ibid.* Respondent's argument rests entirely on hindsight. As the special master explained, the sum of *all* the information available to the government attorneys in 1982 indicated that Marchenko's first name was Nikolai, Pet. App. 166a-167a, and that state of affairs obscured the relationship among the Fedorenko protocols, the Polish materials, and "Ivan the Terrible." See Pet. 20 n.16.[9]

iii. Respondent's arguments concerning reports casting doubt on Otto Horn's identification of respondent (Br. in Opp.

Dem'yanyuk." Gov't C.A. App. 214-216, 850 (second Malagon statement); Pet. App. 65a-67a (same). Thus, at the time respondent made his oral request for information, Moscowitz did not believe that the Fedorenko protocols identified someone other than respondent as Ivan the Terrible. See also Pet. 21 n.17. The special master explicitly found no misconduct on the part of Moscowitz relating to his failure to produce the Fedorenko protocols during or after the denaturalization trial. Pet. App. 252a, 254a-257a. The special master also correctly rejected respondent's claim that the denaturalization decision created a post-judgment obligation on the government to produce the Fedorenko protocols. *Id.* at 258a.

[9] Respondent's criticism of the government attorneys is particularly unwarranted in light of the special master's finding that "[respondent's] attorneys did not adequately pursue every lead the government responses provided, and they, too, are responsible for the outcome of discovery in the denaturalization case." Pet. App. 261a.

12-16) are also misplaced, because the United States did not submit Horn's identification in support of Israel's extradition request, but instead relied on the testimony of six Treblinka survivors to establish probable cause in the extradition proceeding. See Pet. 4. Respondent concedes that fact (Br. in Opp. 14 n.20), but suggests that the Horn identification significantly influenced the denaturalization judgment, which in turn influenced the extradition case (*ibid.*). That chain of reasoning does not withstand scrutiny.[10] In any event, it does not demonstrate fraud on the court. See Pet. 20 n.16.[11]

---

[10] The government's denaturalization case against respondent also included respondent's Trawniki identification card, five survivor identifications, and respondent's admission that he had a blood group tattoo (a talisman of SS guards). See *United States* v. *Demjanjuk*, 518 F. Supp. 1362, 1365-1378 (N.D. Ohio 1981). In addition, as the special master noted, respondent's alibi was "so incredible as to legitimately raise the suspicions of his prosecutors that he lied about everything—including his denial that he was Ivan the Terrible." Pet. App. 261a n.598.

[11] Respondent ignores the special master's rejection (Pet. App. 251a) of respondent's claim that Moscowitz acted fraudulently in presenting Horn's testimony at the denaturalization trial. Respondent also neglects to note that, in its discovery responses, the government provided him with the names of the investigators who presented the photospreads to Horn (Gov't S.M. Exh. 4), but that respondent never pursued that information and that the internal reports, far from being exculpatory, state that Horn positively identified both respondent's 1942 Trawniki photograph and his 1951 visa photograph. Pet. App. 73a, 76a. After evaluating the strength of Horn's identification in light of the description of the photospread procedure found in the investigators' reports, the Israeli trial court concluded that the investigators' reports "do not detract from the strength of the identification by Horn." Gov't C.A. App. 564. The Supreme Court of Israel noted that the identification procedure contained "defects," but held that "probative weight should be given to [Horn's] identification, and credibility can be ascribed to it." Isr. S. Ct. Dec. ¶ 349 (English translation at 394-395; Hebrew original at 303). The court also stated that the description of the identification procedure "cannot detract from the basic fact that HORN identified [respondent] as IVAN from Treblinka and persisted in this

3. As this Court recently stated, "'[i]nroads on the concept of finality tend to undermine confidence in the integrity of our procedures' and inevitably delay and impair the orderly administration of justice." *Custis* v. *United States*, 114 S. Ct. 1732, 1739 (1994). The court of appeals' ruling, which departs from established law, invites other litigants to bring similar actions under Rule 60(b) attacking the finality of judgments, no matter how old. The result will be a substantial new burden on the courts. This case precisely demonstrates that point. The special master determined that the government attorneys acted in good faith and that nothing uncovered in his extensive investigation "has cast any substantial doubt" on the prior judicial finding that respondent should be denaturalized and deported. Pet. App. 266a. Notwithstanding those findings, the court of appeals found fraud on the court and has called into question respondent's denaturalization, which rests on a 13-year-old judgment. As a result, the final resolution of respondent's immigration status will be subject to protracted relitigation and substantial delay. See Pet. 23-24 & n.18.[12]

---

position when he was interrogated in 1980 [.]" *Id.* at ¶ 346 (English translation at 389; Hebrew original at 299).

[12] In the district court, the United States has sought a judicial declaration that the denaturalization judgment against respondent independently rests on the district court's finding that he served at Trawniki. Pet. 23 n.18. Respondent countered that the government's motion was "premature" until the court of appeals' decision finding fraud on the court becomes final. Def. Resp. to the Pltf. Mot. to Reopen Judgment at 4 (filed Feb. 24, 1994). Respondent contends, however, that the court of appeals' decision, once final, will require the district court to vacate the denaturalization judgment and will preclude the government from proceeding anew against him. See Def. Resp. to Pltf. Reply in Support of Mot. to Reopen Judgment at 4 (filed Mar. 18, 1994). Significantly, respondent argues here that review by this Court is also "premature" because the lower courts have not decided the effect of the court of appeals' decision on the denaturalization decision against him (Br. in Opp. 25).

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

DREW S. DAYS, III
Solicitor General

AUGUST 1994

(6)

Supreme Court, U.S.
FILED
SEP 14 1994
OFFICE OF THE CLERK

No. 93-1875

In the Supreme Court of the United States

OCTOBER TERM, 1994

R.H. RISON, ET AL., PETITIONERS

v.

JOHN DEMJANJUK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONERS

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

10 pp

TABLE OF AUTHORITIES

Cases:	Page
Brady v. *Maryland*, 373 U.S. 83 (1963)	2, 3
Communist Party v. *Subversive Activities Control Board*, 351 U.S. 115 (1956)	5, 6
Davis v. *Packard*, 32 U.S. (7 Pet.) 276 (1833)	4
FTC v. *Sun Oil Co.*, 371 U.S. 505 (1963)	4
Thornton v. *Carson*, 11 U.S. (7 Cranch) 596 (1813)	4
Rule:	
Fed. R. Civ. P. 60(b)	4

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1875

R.H. RISON, ET AL., PETITIONERS

v.

JOHN DEMJANJUK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONERS

Our petition for a writ of certiorari seeks review of the court of appeals' ruling that government attorneys who acted in good faith and without a subjective intent to defraud during litigation against respondent nevertheless committed fraud upon the court by failing to disclose during respondent's denaturalization and extradition proceedings information that they did not consider exculpatory. We submit this supplemental brief to address an intervening matter that has recently arisen.

1. The Office of the Solicitor General follows a practice of providing copies of all Supreme Court briefs and petitions prepared within the Office to all attorneys within the Office. Kent L. Jones, the Tax Assistant to the Solicitor General, accordingly received a copy of the government's certiorari petition in this case. Mr. Jones

informed the government attorneys responsible for preparing the petition that upon reading the petition and appendix, he recalled a conversation with Allan A. Ryan, Jr., in early 1980. Mr. Ryan was an Assistant to the Solicitor General until early 1980, when he became Deputy Director of the Office of Special Investigations (OSI). See Pet. App. 100a. Mr. Jones also served as an Assistant to the Solicitor General at that time, until March 15, 1980, when he left that position for private practice. According to Mr. Jones, the conversation occurred after Mr. Ryan left the Solicitor General's Office in early 1980 and before Mr. Jones left the Office on March 15, 1980.

Mr. Jones recalled that during this casual conversation with Mr. Ryan, Mr. Ryan mentioned a pending OSI investigation in which the government knew that an individual had been a Nazi camp guard. Mr. Jones recalled Mr. Ryan's stating that the government had some information that might be conflicting as to the camp at which the individual had served. According to Mr. Jones, Mr. Ryan said that it did not make a difference at which camp the individual had served, because in either event he was in the United States illegally. Mr. Jones remembered suggesting to Mr. Ryan that the conflicting information would come out during the proceeding against the individual. According to Mr. Jones, Mr. Ryan replied that the government did not have a duty to disclose the information. Mr. Jones then asked Mr. Ryan whether this Court's decision in *Brady* v. *Maryland*, 373 U.S. 83 (1963), applied, and Mr. Ryan said he did not think so. According to Mr. Jones, Mr. Ryan did not mention the name of the person under investigation.

2. After learning this information, government counsel sent a letter to counsel for respondent John

Demjanjuk, recounting Mr. Jones's recollection. See Addendum, *infra*, 1a-3a. The government also sent a copy of that letter, dated August 22, 1994, to the special master in the proceeding below and to counsel for other individuals involved in that proceeding, including counsel for Mr. Ryan. On August 26, 1994, Mr. Ryan wrote to respondent's counsel that he did not recall the conversation with Mr. Jones and that he could state with confidence that he never said or meant to imply that OSI intended to withhold material information because *Brady* v. *Maryland*, *supra*, did not compel its disclosure. See Addendum, *infra*, 4a-5a.

On August 30, 1994, respondent's counsel wrote to the Solicitor General about the matter. See Addendum, *infra*, 6a-8a. Respondent's counsel stated, among other things, that our disclosure of Mr. Jones's recollection put into issue whether the government attorneys in the denaturalization and extradition proceedings acted in good faith and without subjective intent to defraud, "thereby altering the question the Court would have to decide if certiorari were granted." *Id.* at 6a. Respondent's counsel stated their belief that "the Solicitor General should withdraw the petition for a writ of certiorari or should inform the Supreme Court that there are serious questions that suggest that the Court may wish to deny certiorari or to remand the case; and should inform the Sixth Circuit that this new credibility issue exists and might call for renewed adversary inquiry. Compare Communist Party v. SACB, 351 U.S. 115 (1956)." *Id.* at 8a. We have prepared this supplemental brief to apprise the Court of the matter and its relationship to our petition.

3. We provided respondent's counsel with the recollection that Mr. Jones reported to us to ensure that they have access to information that they may deem relevant

in their representation of Mr. Demjanjuk and that they might not otherwise discover. We disagree, however, with respondent's suggestion that Mr. Jones's recollection alters the question presented in our certiorari petition in this Court or otherwise diminishes the need for this Court's review. We have petitioned for a writ of certiorari in this case because the court of appeals' ruling on a question of law—specifically, the appropriate standard for evaluating an allegation of fraud on the court—is inconsistent with the decisions of other courts of appeals and the language of Rule 60(b) of the Federal Rules of Civil Procedure. Mr. Jones's report of his recollection does not alter the court of appeals' legal ruling, eliminate the conflict, or reduce the need for a consistent legal standard for resolving allegations of fraud on the court.

Respondent has suggested that Mr. Jones's recollection alters the question presented for review because that question "presumes the OSI attorneys in question acted in 'good faith,' lacked 'subjective intent to defraud', and possessed only 'information that they did not consider exculpatory.'" Addendum, *infra*, 6a. Our question presented, however, did not merely "presume" those facts, but relied on the special master's factual determinations, which the court of appeals accepted in all relevant respects. See Pet. 6-11, 12-13. As this Court has made clear, the question presented in a petition for a writ of certiorari is determined by the decision and the record below. See *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 512 & n.7 (1963); *Davis* v. *Packard*, 32 U.S. (7 Pet.) 276, 281-282 (1833). Under longstanding practice, this Court's review on the merits is similarly restricted to that record. See, *e.g.*, *Thornton* v. *Carson*, 11 U.S. (7 Cranch) 596, 601 (1813). An extra-record report of an individual's recollection—even if it bears on the case—cannot by

itself disturb the validity of a judgment or displace the record upon which the judgment rests. By the same token, it cannot provide a basis for denial of the petition for a writ of certiorari in a case that otherwise satisfies this Court's standards for review.

Contrary to respondent's suggestion, our disclosure of Mr. Jones's recollection also provides no basis for remanding the case at this juncture "for renewed adversary inquiry." Addendum, *infra*, 8a. Mr. Jones's recollection does not provide an alternative ground for affirming the court of appeals' judgment or a ground for setting it aside. It will become relevant to these proceedings—to the extent it has any relevance at all—only if this Court reverses the judgment on the basis that we have urged and remands the case for further action under the appropriate legal standard. We do not believe that Mr. Jones's recounting of his recollection would provide a basis for disturbing the special master's factual findings. But should respondent disagree, he can request the court of appeals to examine on remand whether the matter warrants a reopening of the factual record.*

---

* This Court's decision in *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115 (1956), which respondent's counsel cited in their correspondence, Addendum, *infra*, 8a, is inapposite. In that case, the petitioner was ordered to register with the Attorney General as a "Communist-action" organization. 351 U.S. at 116. The petitioner appealed that order, and while the appeal was pending it filed a motion to adduce additional evidence, alleging that it had recently learned that the Subversive Activities Control Board, which had issued the order, had relied on perjurious testimony. The court of appeals denied the motion and affirmed the order. In this Court, the petitioner challenged both the denial of its motion and the constitutionality of the registration requirement. *Id.* at 122. The Court granted the petition and

In sum, this Court should review this case because the court of appeals' decision creates conflicting legal standards among the circuits on an important question of federal law. The recollection of a single individual with no direct involvement in the underlying dispute does nothing to dispel that conflict or diminish the importance of the issue. For the reasons stated in our petition and our reply brief, it is respectfully submitted that the petition for a writ of certiorari should be granted.

DREW S. DAYS, III
Solicitor General

SEPTEMBER 1994

---

reversed on the ground that the court should have allowed consideration of the new evidence, which amounted to an "uncontested challenge of perjury." See *id.* at 122-125. Here, by contrast, no question concerning Mr. Jones's recollection was raised or decided below, and that recollection—which does not amount to an "uncontested challenge of perjury"—does not provide a basis for reversing the judgment.

ADDENDUM A

U. S. Department of Justice

Washington, D.C. 20530

August 22, 1994

Michael G. Dane
Office of the Federal Public Defender
Northern District of Ohio
Skylight Office Tower—Suite 750
1680 West Second Street
Cleveland, OH 44113-1454

Michael E. Tigar
School of Law
University of Texas at Austin
727 East 26th Street
Austin, Texas 78705

Re: *Demjanjuk v. Petrovsky*, No. 85-3435

Dear Messrs. Dane and Tigar:

We are writing to advise you of information that recently came to our attention.

Kent L. Jones currently is the Tax Assistant to the Solicitor General. Mr. Jones also served as an Assistant to the Solicitor General for a period that ended on March 15, 1980. Mr. Jones has informed us that upon reading the government's petition for certiorari in this case, he recalled a conversation

with Allan Ryan during his prior service in the Solicitor General's office. According to Mr. Jones, this conversation occurred after Mr. Ryan left the Solicitor General's office in early 1980 and before Mr. Jones left the office on March 15, 1980.

Mr. Jones recalled that during a casual conversation with Mr. Ryan, Mr. Ryan mentioned a pending OSI investigation in which the government knew that an individual had been a Nazi camp guard. Mr. Jones recalled that Mr. Ryan stated, however, that the government had some information that might be conflicting as to the camp at which the individual had served. According to Mr. Jones, Mr. Ryan stated that it did not make a difference at which camp the individual had served, because in either event he was in the United States illegally. Mr. Jones recalled that he suggested to Mr. Ryan that the conflicting information would come out during the proceeding against the individual. According to Mr. Jones, Mr. Ryan replied that the government did not have a duty to disclose the information. Mr. Jones then asked Mr. Ryan whether *Brady* applied, and Mr. Ryan said that he did not think so. According to Mr. Jones, Mr. Ryan did not mention the name of the person under investigation.

Very truly yours,

/s/Patty Merkamp Stemler
PATTY MERKAMP STEMLER
Chief

/s/Joseph Douglas Wilson
JOSEPH DOUGLAS WILSON
Attorney

Appellate Section
Criminal Division
(202) 514-2611

cc: Hon. Thomas A. Wiseman, Jr.
Richard D. Glovsky
Charles P. Goodell
Gerald J. Houlihan
Irvin B. Nathan

ADDENDUM B

ALLAN A. RYAN, JR.

Suite 980
1350 Massachusetts Avenue (617) 495-0525
Cambridge, Massachusetts 02138 Fax (617) 495-5079

August 26, 1994

Michael Tigar, Esq.
School of Law
University of Texas at Austin
727 East 26th Street
Austin, Texas 78705

Dear Michael:

I have received a copy of Ms. Stemler's letter of August 22, 1994 to you and Mr. Dane, concerning Kent L. Jones.

Mr. Jones was not on the staff of the Office of Special Investigations, and I do not recall speaking to him at any time, in a "casual conversation" or otherwise, about any "pending OSI investigation", or indeed about any OSI matter. If he means to suggest—as I gather from Ms. Stemler's letter that he does—that I stated or implied to him that OSI intended to withhold material information because *Brady* v. *Maryland* did not compel its disclosure, then I can say with confidence that I never said, nor meant to imply, such a thing to anyone.

I testified in detail before Judge Wiseman on my views on government disclosure in denaturalization cases independent of what *Brady* might require. I stand by that testimony.

Sincerely,

/s/ Allan A. Ryan, Jr.
Allan A. Ryan, Jr.

cc:
Hon. Thomas Wiseman
Michael G. Dane, Esq.
Gerald Houlihan, Esq.
Irving Nathan, Esq.
Charles Goodell, Esq.
Patty Stemler, Esq.

ADDENDUM C

MICHAEL E. TIGAR
Joseph D. Jamail Centennial Chair in Law
THE UNIVERSITY OF TEXAS SCHOOL OF LAW

727 E. 26th Street . Austin, Texas 78705-3299
(512) 471-6319 . FAX (512) 478-3202

August 30, 1994

Hon. Drew S. Days, III
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Re: Rison v. Demjanjuk, Supreme Court No. 93-1875

Dear General Days:

The United States has filed a petition for certiorari in the above-captioned case. In the Question Presented, you use language that presumes the OSI attorneys in question acted in "good faith," lacked "subjective intent to defraud", and possessed only "information that they did not consider exculpatory." The August 22, 1994 letter from Patty Stemler and Joseph Douglas Wilson (copy attached) puts those presumptions at issue, thereby altering the question the Court would have to decide if certiorari were granted.

We believe that the revelations that are the subject of the government's letter of August 22, 1994, and the consequences that may flow from them, should be brought to the Supreme Court's attention. This

should be done in order to avoid the possibility that certiorari would be granted only to later learn that the question as framed by the government cannot be decided due to the lack of a full record in the courts below. We further believe that this matter should be brought to the Court's attention by the petitioning party.

In considering the reasonable inferences that can be drawn from the information in the government's August 22, 1994 letter, we note that the government has chosen, most appropriately, to send this information to us, with a copy to the Special Master, and chose to do so under the Sixth Circuit Demjanjuk case caption. Mr. Jones's conversation with Mr. Ryan would support inferences contrary to the assertions in the Supreme Court question presented, and would—in our view—have been material and relevant in the Special Master's and the Court of Appeals' assessment of Mr. Ryan's credibility. It would also appear to have direct relevance to the government's lawyers' attitudes toward disclosure of material evidence during the crucial periods in early 1980 and in 1981 when Mr. Ryan was director of OSI and immediately prior to and during the Demjanjuk denaturalization litigation. (We remind you that an allegation of Demjanjuk's presence at Treblinka carried the prospect of extradition to Israel on a capital charge, while allegations of actions at other camps would not.) We view the significance of Mr. Jones's statements in light of the close credibility questions that dominated the proceedings before the Special Master and in the Sixth Circuit, as reflected both in the Master's Report and the Court of Appeals' Opinion. Mr. Ryan's flat contradiction of Mr. Jones (letter attached) only intensifies the legitimate concerns on these issues. (In the court of appeals opinion of which you seek review, Judge Lively says the court is "accepting as true that no OSI attorney

deliberately withheld from Demjanjuk or the court information that he believed he had a duty to disclose, even though the withholding itself was deliberate." 10 F.3d at 349.)

Under these circumstances, we believe the Solicitor General should withdraw the petition for certiorari or should inform the Supreme Court that there are serious questions that suggest that the Court may wish to deny certiorari or to remand the case; and should inform the Sixth Circuit that this new credibility issues exists and might call for renewed adversary inquiry. Compare Communist Party v. SACB, 351 U.S. 115 (1956).

In the meantime, we ask for all documents and other records currently in the government's possession or reasonably discoverable, related to the information provided to us in the government's letter of August 22, 1994. We are willing to meet on short notice, but request the favor of at least some response to this communication within forty-eight hours, given the imminence of the Court's Term opening. I can also be reached by telephone.

Sincerely,

/s/ Michael E. Tigar
Michael E. Tigar
Michael G. Dane
Edward F. Marek

cc: Patty Merkamp Stemler
Joseph Douglas Wilson

VIA FAX
HARD COPY BY MAIL